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ABSTRACT

This hearing transcript presents testimony, a prepared statement, and supplemental materials provided by Evan J. Kemp, Jr., Chairman of the Equal Employment Opportunities Commission (EEOC), specifically related to implementation of the Americans with Disabilities Act (ADA). The hearing deals with EEOC enforcement strategies for implementing Title I of the ADA, including the development of clear and concise regulations, policies, and procedures. The hearing specifically addresses: (1) plans for meeting the growing demands by the public and by business entities for information and guidance; (2) plans to handle the potential flood of cases; (3) the concept of reasonable accommodation; (4) training of EEOC employees in disability law; (5) technical assistance to employers and individuals with disabilities; (6) implementation of the Charge Data System and the ADA Tracking System; (7) budget and staffing; and (8) state and local fair employment practices agencies. Supplemental materials include copies of several EEOC publications: "The Americans with Disabilities Act: Questions and Answers," "The Americans with Disabilities Act: Your Employment Rights as an Individual with a Disability," "The Americans with Disabilities Act: Your Responsibilities as an Employer," and regulations published in the Federal Register on equal employment opportunities for individuals with disabilities. (JDD)

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OVERSIGHT HEARING ON THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S IMPLEMENTATION OF THE AMERICANS WITH DISABILITIES ACT (TITLE I ON EMPLOYMENT AND TITLE V COVERING MISCELLANEOUS PROVISIONS)

ED347740

HEARING

BEFORE THE

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, OCTOBER 30, 1991

Serial No. 102-66

Printed for the use of the Committee on Education and Labor

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WEDNESDAY, OCTOBER 30, 1991

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES,
COMMITTEE ON EDUCATION AND LABOR,
Washington, DC.

The subcommittee met, pursuant to call, at 10:05 a.m., Room 2261, Rayburn House Office Building, Hon. Carl C. Perkins [Chairman] presiding.

Members present: Representatives Perkins, Andrews, Olver, and Gunderson.

Staff present: Omer Waddles, counsel/staff director; Geri Grigsby, legislative analyst; Deborah Katz, office manager; and Randel Johnson, minority labor counsel.

Chairman PERKINS. I'd like to call this meeting of the subcommittee to order, please.

At this juncture, we would like to welcome Chairman Kemp of the EEOC. It's a privilege to have you with us today, sir, and we're very honored to have you here and present your testimony and give us the opportunity to ask some questions concerning some things and matters that we would like to get a little information on.

I'd, first of all, just like to read a statement that kind of sets the tone, we hope, for the hearing today.

On July 26, 1990, the Americans with Disabilities Act became the law of the land.

Hailed as a major victory of Americans with disabilities, and for our Nation as a whole, the ADA found overwhelming bipartisan support from both the House and Senate, and from the President.

In the act, the government clearly stated that our goals regarding individuals with disabilities are "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."

Let me stress from the onset that we are not—not—here today to reexamine the nature or the merits of the act itself, nor are we here to amend or lessen the protections of this legislation.

The ADA is the law, we are behind it 100 percent, and we intend for it to work.

Since this subcommittee's primary objective regarding the ADA is its proper enforcement, we have as our only witness today Hon. Evan J. Kemp, Jr., Chairman of the Equal Employment Opportunity Commission.

Chairman Kemp, first of all, it is always good to have you with us and we're going to be asking you some further questions as we go along.

But the employment provisions of the act, comprising

Title I, will become effective July 26, 1992, less than 9 months away, and the EEOC, which has been given the job of enforcing these provisions, is confronted with a great challenge that the Congress and the President demand be fulfilled.

Specifically, the ADA directs the EEOC to issue regulations to carry out Title I, develop and implement a technical assistance plan, provide such technical assistance to all entities covered under the act, develop and provide manuals, and to investigate charges of discrimination and take necessary actions to ensure full remedies for violations of the law.

As members of this subcommittee, with oversight duties regarding your Commission, we are here to listen and to help you meet this challenge.

It is our responsibility to ensure the adequacy of your actions, and in doing so, we want to know in detail what measures your agency has taken to comply with the mandates of the ADA. In particular, we want to know your plan to meet the growing demands for information and guidance by the public and business entities as more become aware of the law, as well as your plan to handle the potential flood of cases once the law takes effect.

As an authorizing committee, it's imperative that you provide to us a clear, accurate picture of your budget needs in this area. Other issues relating to your Commission to be addressed by Congress, such as sexual harassment in the workplace, and possible reform in the complaint process for Federal employees, should be kept in mind as we discuss EEOC's overall needs.

I understand you have a proposal for a revolving trust fund to provide technical assistance to the business and government communities and to charge recipients for these services.

The subcommittee looks forward to your elaborating on this proposal, particularly in terms of how this could help in the distribution of information to these entities, as well as the impact in setting up such an institute will have on the EEOC's overall efficiency.

Let me make clear that this subcommittee is watching your actions and requests with great interest. There are many potential problem areas but it is felt that it can all be dealt with if adequate information and guidance are provided to the community. This effort will take additional staff and funding for communications.

Because of the President's support for this law, we in the Congress expect to see it manifested in serious and adequate budget requests that intend a successful implementation and oversight of regulations and standards. Anything less is simply not acceptable.

Our business and manufacturing community deserves more help in preparing for this law, and we expect to see the President's commitment to the ADA come shining through in the budget proposals from the EEOC.

Mr. Gunderson, do you have any opening statements?

Mr. GUNDERSON. Mr. Chairman, thank you. Rather than an opening statement, let me just make opening comments, because I do not have a prepared statement, but I want to join you in welcoming Chairman Kemp here to the Employment Opportunities Subcommittee.

This is your home. It's our home, as we try to deal with the whole issue of equal opportunities in the employment sector for all Americans—that's what ADA was about. The mission now is to review the proposed regulations and to deal with the number of concerns. You are probably more aware of those concerns than any of us because of your in-depth interaction on this particular issue.

But we really want to indicate to you that as we go through your statement and as we get into questions and answers, I do hope that you will deal in particular with the issues of reasonable accommodation, and with the direct threat to a couple of the issues that have been raised by the community. As we deal with the whole issue of employment opportunities, I hope we also deal with the issues of training of employees to give them full opportunity. And in that area in particular there are some additional issues that we want to talk about.

As I look at you, I notice not only your tie—that I assume was picked out from my district—but your Gallaudet pin, which, of course, gets to a particular area that I would like to focus on in the questioning and that is the area of these regulations as they affect the hearing impaired.

With that, Mr. Chairman, I look forward to Chairman Kemp's statement.

Chairman PERKINS. Thank you, Mr. Gunderson.

We're looking forward to hearing from you, Mr. Chairman, so without delay I'll let you proceed and give us your pearls of wisdom.

STATEMENT OF HON. EVAN J. KEMP, JR., CHAIRMAN, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ACCOMPANIED BY ELIZABETH THORNTON, DEPUTY LEGAL COUNSEL, AND KASSIE BILLINGSLEY, DIRECTOR, FINANCIAL AND RESOURCE MANAGEMENT SERVICES, EEOC

Mr. KEMP. Good morning, Chairman Perkins and Mr. Gunderson.

Thank you for inviting me here today to discuss EEOC's implementation of the Americans with Disabilities Act of 1990.

As the Nation's leading civil rights law enforcement agency, EEOC enforces laws prohibiting employment discrimination based on race, color, religion, sex, national origin, age, and disability for Federal employees or applicants under Section 501 of the Rehabilitation Act.

Beginning on July 26, 1992, the EEOC will enforce Title I of the ADA. Title I of the ADA prohibits private employers, State and

local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions and privileges of employment.

A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question.

An employer is required to make an accommodation to the known disability of a qualified applicant or employee if it would not impose an undue hardship on the operation of the employer's business.

I have explained in greater detail in my written testimony many of the ADA's definitions.

Today I will concentrate on the Commission's enforcement strategy for implementing the ADA's Title I provisions. A major element of our strategy calls for the development of clear and concise regulations, policies and procedures.

Beginning with the issuance of an Advance Notice of Proposed Rulemaking in the Federal Register, the Commission sought the input of all groups affected by the Title I provisions. The Commission received 138 comments from various disability rights organizations, employer groups and individuals in response to the ANPRM.

Comments were also solicited at 62 ADA input meetings conducted by Commission field offices throughout the country. More than 2,400 representatives from disability rights organizations and employer groups participated in these meetings.

Proposed regulations and an interpretive appendix were published in February 1991, and final regulations were issued by July 26, 1991, as mandated by Congress.

The Commission received 697 timely comments from interested groups and individuals in response to the Notice of Proposed Rulemaking. As a result of these comments, we revised the final regulations to clarify and modify several definitions, as well as the interpretive guidance in the Appendix.

Since publication, the Commission has distributed over 15,000 copies of the final regulations which are available also in braille and large print, on audio tape and computer disk.

EEOC also changed its existing regulations for recordkeeping and reporting to reflect employers' ADA recordkeeping responsibilities.

By January 26, 1992, the Commission will publish in the Federal Register coordination regulations between the EEOC and the Department of Labor to set forth procedures governing the processing of complaints that fall within the overlapping jurisdiction of Title I of the ADA and Section 503 of the Rehabilitation Act of 1973.

The regulation has been signed by me and the Secretary of Labor and was published this past Monday, October 28, in the Federal Register for a 30-day public comment period.

Similar coordination regulations between the Commission and the Department of Justice will address potential enforcement conflicts between the ADA and Section 504 of the Rehabilitation Act. We expect to publish a proposed regulation in advance of the statutory deadline.

I would like to tell you what the EEOC has been doing to prepare its employees for ADA enforcement.

Since 1979, EEOC has had overall responsibility for the Federal sector equal opportunity complaint processing system. However, only EEOC administrative judges—who hold hearings on Federal complaints of discrimination—and the staff of our Office of Federal Operations—who decide Federal complaints at the appellate level—have had experience in resolving complaints filed on the basis of physical, emotional or mental disability.

Because EEOC's experience and expertise on disabilities is limited to a portion of our total work force, effective training of our employees is essential.

The ADA is a complex statute which will require a different approach to investigations than that used under the other laws EEOC enforces.

EEOC's available funds for training in recent years have been minimal. For instance, EEOC had only $16.82 per employee to spend on training in fiscal year 1990. In fact, EEOC has not been able to have a comprehensive training program since 1987.

In fiscal year 1991, we were able to spend $1.2 million to provide some initial training to EEOC's staff. We still have a great need for more training.

To prepare our investigative and litigation units for the anticipated 20 percent increase in charges when the ADA becomes effective, the Commission has embarked upon an ambitious program of staff training.

EEOC plans intensive training in ADA investigations for field enforcement and litigation staff. We are currently developing a training curriculum.

Early in 1990, EEOC began collecting disability training and technical assistance materials from Federal, State and private sources. We developed a computerized information library of these resources.

In addition, the EEOC solicited the help of State agencies to learn what their experience has been in enforcing State employment discrimination statutes similar to the ADA.

We also established points of contact in our district offices for the purpose of having employees in each office with expertise in ADA.

We also established an ADA Service Unit within the Office of Legal Counsel with a Policy Division and a Technical Assistance Division. The Unit provides policy guidance and technical assistance advice to EEOC employees and to the public.

Congress mandated that the ADA enforcement agencies provide technical assistance to employers and individuals with disabilities so that all concerned may learn of their rights and responsibilities under the new law.

The Commission expects that its technical assistance efforts will result in greater compliance with the ADA's employment requirements with a corresponding reduction in the need to resort to enforcement activity.

In December 1990, the Commission's draft Technical Assistance Plan was published in the Federal Register. An interagency ADA

Technical Assistance Coordinating Group was established and chaired by EEOC.

Through its fiscal year 1991 budget and a supplemental appropriation, EEOC has received $4.6 million in appropriations for technical assistance activities. The funds will be used in a variety of technical assistance activities with emphasis on training for employers and for individuals with disabilities.

The Commission also will utilize a wide range of media and video formats to provide employers with training and information on their responsibilities.

The EEOC held informal consultations with national organizations representing employers and people with disabilities to get suggestions for a technical assistance program and a Technical Assistance Manual. We conducted these to learn what employers wanted to know about the ADA and in what format they wanted to receive the information.

The Commission's technical assistance program includes the development of information materials and training for employers, individuals with disabilities and the public.

The program is designed to provide information for compliance with the law to all those covered by Title I legal requirements. However, in allocating limited resources, priority will be given to providing technical assistance to target our audiences. For example, smaller employers generally have not had previous experience in meeting the non-discrimination requirements of the Rehabilitation Act of 1973.

Activities to inform people with disabilities about their ADA rights and how to exercise them will also receive priority. Because it will be difficult to reach millions of persons with different disabilities, the Commission intends to utilize networks of organizations such as Independent Living Centers, State Vocational Rehabilitation agencies, and many other public and private agencies that work with, or are run by people with disabilities, to provide information and assistance on the law.

In addition to its own technical assistance activities, EEOC will continue to encourage and assist technical assistance efforts conducted by other Federal agencies and by organizations representing employers and individuals with disabilities. In fact, I will be attending tonight a meeting of grantees, selected by the National Institute on Disability and Rehabilitation Research, the Department of Justice, and the Rehabilitation Services Administration, to provide training and technical assistance nationwide to employers, individuals with disabilities, and rehabilitation professionals on the ADA.

EEOC staff will participate in this two-day coordinating effort.

EEOC will reach virtually all employers covered by ADA through a joint mailing effort with the Internal Revenue Service. In February 1992, a notice will be inserted in the IRS quarterly mailing to employers, giving the effective dates of the ADA and advising them of where they can get further information.

The Commission will announce soon a joint Department of Justice/EEOC nationwide training program to provide extensive training to individuals with disabilities in the requirements of Titles I,

II and III, and techniques in providing technical assistance and alternative dispute resolution.

In addition, the Commission plans to let a contract to train employers on the obligations under the ADA. We are currently preparing a Request for Proposals and anticipate beginning training in February of 1992.

The ADA mandates that a technical assistance manual be published by January 26, 1992, 6 months prior to the effective date of Title I. The EEOC Technical Assistance Manual will be completed by that date. The manual will be a major resource for employers and persons with disabilities. It will explain the legal requirements of the statute and its rules and regulations, and will include guidance on reasonable accommodation.

The manual also will include a directory of technical assistance resources for reasonable accommodation, accessibility, and other aspects of compliance.

Consistent with our mandate to provide technical assistance to employers and individuals, we are proposing to establish a Technical Assistance Revolving Fund. This fund is a reflection of our pursuit to establish creative and deficit-neutral means whereby EEOC can provide maximum technical assistance.

Similar to other governmental revolving funds, the Technical Assistance Revolving Fund will be supported primarily from collections and payments received from recipients of technical assistance training.

Initial start-up funding will be provided by a one-time transfer of up to $1 million from EEOC's Salaries and Expense Account and the ADA Technical Assistance Account.

Historically, and currently, EEOC has faced years of constrained funding and changing priorities. These forces have curtailed the development of solid technical assistance and training programs. We are truly excited about the potential establishment of the Revolving Fund.

Given the demand for technical assistance already evident, we believe the fund will become solvent within 2 years.

We have received considerable support for the establishment of this fund from both the House and the Senate. In fact, our appropriations Conference Report language reiterates support for this fund.

We greatly appreciate your assistance in amending the appropriate authorizing vehicle for this fund.

Another component of the Commission's technical assistance program is its outreach efforts. EEOC sees public outreach and public awareness as crucial to the successful implementation of the ADA. In addition to responding to requests for more than 15,000 copies of the final rule since last July, EEOC has written booklets for individuals with disabilities and employers. 5,000 copies of each were distributed in just 1 month. These booklets are available in Spanish and the alternate formats of braille, large print, audio tape, and computer disk.

EEOC has also, in conjunction with the Department of Justice, published "Questions and Answers on the ADA," which focuses on Titles I and III.

Mr. Chairman, with the subcommittee's permission, I ask that these publications be made part of today's hearing record.

[The publications are included at the end of the hearing.]

Mr. KEMP. EEOC maintains a speakers bureau which provides trained speakers to explain the ADA. EEOC currently has 33 speakers available. The bureau has scheduled more than 400 presentations from July of 1990 to October 1991 to a wide variety of organizations.

We have prepared an ADA Handbook, which includes annotated versions of the regulations and interpretive language for the employment and public accommodation titles of the ADA. An advance copy has been made available to each member of the subcommittee this morning.

[The material is maintained in subcommittee files.]

Beginning November 8, the Commission will establish an ADA Helpline as part of our toll-free 800 information service. It will expand our public information and technical assistance activities.

EEOC will continue to provide technical assistance after ADA becomes effective. The Commission will work closely with disability groups, employer organizations, and other Federal agencies, utilizing their resources and information networks to supplement its own technical assistance activities.

Later this fall, a technical assistance program will be established and managed in each of the Commission's 23 district offices. The staff in these positions will provide technical assistance, internal and external training, and general outreach activities.

In addition, a request for proposal will be issued shortly to conduct a pilot program on Alternative Dispute Resolution in five of EEOC's district offices. This effort is an attempt to further voluntary compliance and to reduce the impact of inadequate enforcement resources.

The charge data system allows each office to enter the history of every charge filed with the EEOC. The information contained in each office's system is transmitted to headquarters to the agency's National Data Base.

This system allows management to monitor the Nationwide processing of all charges and to provide instructions to better administer the agency's workload. The system has proved to be an effective management tool and will play an integral part in monitoring ADA charges.

The improvements in our computer systems have also provided EEOC with the tools to develop a comprehensive case management system. A series of programs have been developed allowing every supervisor and field director to monitor the movement of charges by units and offices.

Another technological initiative taken by the Commission was to automate our ADA implementation efforts. Prior to the signing of ADA, EEOC developed an ADA Tracking System to follow the progress and completion of ADA work plan activities and projects.

EEOC currently receives about 60,000 charges a year under Title VII of the Civil Rights Act of 1964, the Equal Pay Act, and the Age Discrimination in Employment Act. State and local agencies receive about another 55,000 charges under similar statutes. EEOC's

current average processing time is about 250 days, down from 295 days just 2 years ago.

In fiscal year 1991, EEOC's investigators completed an average of 88.5 cases per investigator. Despite this high case completion rate, EEOC's investigators already had an average of 59 cases each to investigate when EEOC opened its doors on the first day of fiscal year 1992 on October 1.

Once the ADA takes effect, we expect that there will be a 20 percent increase in our workload or about 12,000 additional charges a year. To avoid the serious backlog problems which EEOC experienced in the late 1970s, it is essential that the Commission receive adequate funding for ADA enforcement.

Our field offices investigate and resolve about 62,000 charges of discrimination annually. When, through these investigations, we determine that discrimination has occurred, we attempt to obtain appropriate remedial relief through informal discussion called conciliation. If conciliation efforts fail, the Commission, at headquarters, will consider litigation against the employer.

However, when the employer is a State or local governmental entity, the Commission will recommend that the Justice Department consider litigation.

Most long-term litigation will be conducted by field office legal division staff. In addition, they will be required to provide day-to-day guidance. During the short-term, the Commission will need to identify experts for use in future, complex litigation of cases brought under the ADA.

Experience gained in litigating the Age Discrimination in Employment Act-BFOQ cases in the mid-1980s will be invaluable to the Commission in conducting ADA litigation. These cases also involved complex, technical issues and required reliance on expert witnesses.

Many of these suits were resolved only after a full trial on the merits or after extensive discovery and deposition testimony. As such, they were expensive and difficult to litigate.

Specific review of the $2.8 million fiscal year 1990 litigation support budget indicated that the Office of General Counsel had $1,400 to support each routine case, because 40 major cases required an average of $43,500 each. The differences among cases is even more apparent in the fact that five large cases required an average of $132,500. That's quite a high figure.

To fully understand EEOC's enforcement efforts, it is necessary to understand the effect that budget cuts have had over the past 6 years.

In fiscal year 1985, the EEOC was able to spend $3.2 million, or $7,800 per case filed in court. Despite the soaring cost of litigation, by 1990, we could only spend $2.8 million, or a mere $4,375 per case.

Assuming we file the same number of cases as fiscal year 1990, we estimate that we would have approximately $5,000 per case in fiscal year 1993. This is clearly the barest minimum.

Similarly, our travel budget for investigating complaints has been decimated in the last 6 years. In fiscal year 1985, EEOC allocated $2.9 million, or $40 per charge, to travel for investigations.

By fiscal year 1990, the amount had shrunk to $1.8 million, or $30 per case.

In the vital area of staff training, the EEOC has had similar reductions. In fiscal year 1985, we allocated $353,000, or $114 per staff, to training. In fiscal year 1990, that amount had totalled only $48,000, or $17 per person.

As I noted earlier, to catch up for years of virtually no staff training, the fiscal year 1991 enacted budget provided us with $1.2 million, but even this amount allows only $421 per person.

The EEOC's ability to resolve charges has been hampered by staffing decreases in recent years. The agency's 1988 full time equivalent (FTE) staff level of 3,168 dropped to 2,796 FTE by fiscal year 1991. Thus, EEOC has had more than a 10 percent decline in staff resources in 4 years, despite the fact that our workload has remained relatively constant.

The agency's field investigative staff dropped sharply from 949 in fiscal year 1988 to 779 in fiscal year 1991. For 5 of the last 7 years, the agency's budget has been cut below the President's funding request for the Commission.

For fiscal year 1992, EEOC received $210 million and an authorized staff level of 2,885. For ADA implementation, however, only $4 million, and 32 additional staff are included in the fiscal year 1992 budget. These 32 additional employees will be field investigators at the GS-7, 9 and 11 level.

In addition to the new positions made available through our fiscal year 1992 appropriations, I have committed the agency to the transfer of positions from the agency's Headquarters to our 50 field offices throughout the Nation. These additional staff in the field will help offset the increase in charges we will receive under the new act next year.

EEOC will also create technical assistance positions in each of the 23 district offices. The technical assistance program will enhance EEOC's service to the public with regard to not just the ADA but also provide technical assistance for all the statutes that EEOC enforces.

EEOC's successes in reducing its inventory have been achieved through an increase in the agency's overall efficiency and productivity.

EEOC's outstanding level of productivity, however, is not sufficient to continue this trend. Staffing resources must remain at a certain level.

With the anticipated 20 percent increase in EEOC's fiscal year 1993 workload as a result of the ADA, any further reduction in our funding would have a chilling effect on our enforcement activities.

As the subcommittee is aware, agencies are instructed to prepare their fiscal year 1993 budget request at the fiscal year 1992 funding level, with a 5 percent cut to that level. The impact of such a funding level would be devastating. For example, at this funding level, our pending charge inventory would dramatically escalate from a fiscal year 1991 level of 45,000 to a level of over 67,000 in fiscal year 1993. Our average charge processing time would dramatically increase from 266 days, or 8 months, in fiscal year 1991, to approximately 600 days, or 20 months in fiscal year 1993.

Historically, civil rights legislation has received reasonable funding. For example, in fiscal year 1989, funding for the Office of Civil Rights, Department of Housing and Urban Development was increased 28 percent. And OCR HUD received an additional 130 staff to implement the Fair Housing Assistance program.

Similarly, after 504 regulations of the Rehabilitation Act were implemented, the Office of Civil Rights, Department of Health, Education, and Welfare received a fiscal year 1978 supplemental of $6.4 million and over 70 additional staff.

In fact, during the first several years of implementation, OCR-HEW received over $31 million for its technical assistance contracted activities alone.

Without an appropriate number of investigators, EEOC cannot sustain our current control of inventory and our practice of resolving all charging party allegations in a timely manner.

A discussion of EEOC's ADA enforcement is not complete without addressing EEOC's relationship with the State and local fair employment practice agencies. Currently, under Title VII, and the ADEA, State and local agencies have an active role to play in processing discrimination charges.

This application of the concept of federalism permits State and local governments to continue their efforts to eradicate discrimination in the workplace.

Work-sharing agreements with FEPAs, however, are considered essential to handle the enormous volume of charges within the limited budgetary resources of the EEOC.

EEOC enters into annual work-sharing agreements and contracts to maximize the efficiency of the State and Federal efforts and to avoid wasteful delay and duplication of efforts.

Congress earmarked $25 million in fiscal year 1991 and fiscal year 1992 specifically for this effort.

Currently, EEOC pays a FEPA $450 for each contract charge completed. EEOC contracts for only a portion of FEPA's total workload based on a formula to evenly distribute the funds among the States.

When a charge is received first by a FEPA with which EEOC has a work-sharing agreement, the FEPA files and processes the charge under its anti-discrimination law.

Within this legal framework, the EEOC's ability to control the processing of charges by FEPAs is limited. Created by and answerable only to State or local governments, the FEPAs are independent of the EEOC's direct supervision over their budgeting or staffing.

I have established a State and local division in the proposed Charge Resolution and Review Program that will allow more centralized EEOC influence over the FEPA operation and allow additional review of the quality of FEPA's charge resolutions.

Speaking generally, FEPAs have had experience enforcing laws prohibiting discrimination on the basis of disability. Forty-six States and the District of Columbia have laws similar to the ADA. Many of the States have been enforcing these laws for 10 to 15 years. Because most States currently have disability laws, the impact of the ADA on FEPA workloads should be minimal when

compared to the dramatic increase EEOC anticipates in its workload.

We are currently in the process of determining the methods and means through which the deferral relationship will be developed. The financial and personnel resource implications of such an undertaking need to be examined.

In fiscal year 1992, we will conduct an in-depth study of State laws addressing disability discrimination and FEPA practices in resolving charges under these State laws.

The FEPAs will also assist in conducting six seminars for employers on current employment discrimination topics under a contract with the International Association of Official Human Rights Agencies.

Mr. Chairman and members of the subcommittee, I hope my discussion of the EEOC's strategy for implementing the ADA has been helpful to you in understanding the important challenges that we face at the Commission.

EEOC is proud of its efforts toward being fully prepared to vigorously enforce this law when it takes effect next July 26 and to ensuring that individuals with disabilities and employers are aware of their new rights and responsibilities.

I'll be happy to answer any questions you might have.

[The prepared statement of Hon. Evan J. Kemp, Jr. follows:]

STATEMENT OF EVAN J. KEMP, JR., CHAIRMAN, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Good morning, Chairman Perkins and members of the subcommittee. Thank you for inviting me here today to discuss EEOC's implementation of the Americans with Disabilities Act of 1990 (ADA).

As the Nation's lead civil rights law enforcement agency, EEOC enforces laws prohibiting employment discrimination based on race, color, religion, sex, national origin, age, and disability for Federal employees or applicants under Section 501 of the Rehabilitation Act of 1973.

Beginning July 26, 1992, the EEOC will enforce Title I of the ADA. Title I of the ADA prohibits private employers, State and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions and privileges of employment.

The ADA defines an individual with a disability as a person who: Has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment.

A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question. Reasonable accommodation may include, but is not limited to: Making existing facilities used by employees readily accessible to and usable by persons with disabilities; job restructuring, modifying work schedules and/or reassignment to a vacant position; or acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

An employer is required to make an accommodation to the known disability of an otherwise qualified applicant or employee if it would not impose an "undue hardship" on the operation of the employer's business. Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources and the nature and structure of its operation.

Today, I will concentrate on the Commission's enforcement strategy for implementing the ADA's Title I provisions. A major element of our strategy calls for the development of clear and concise regulations, policies and procedures.

Regulations

Beginning with the issuance of an Advance Notice of Proposed Rulemaking (ANPRM) in the *Federal Register* on August 1, 1990 (6 days after President Bush signed the ADA), the Commission sought the input of all groups affected by the Title I provisions. The commission received 138 comments from various disability rights organizations, employer groups and individuals in response to the ANPRM. Comments were also solicited at 62 ADA input meetings conducted by Commission field offices throughout the country. More than 2,400 representatives from disability rights organizations and employer groups participated in these meetings.

Proposed regulations and an interpretive appendix were published in February 1991, and final regulations were issued on July 26, 1991, as mandated by Congress. Public comment on the proposed regulations was extensive. The Commission received 697 timely comments from interested groups and individuals in response to the Notice of Proposed Rulemaking (NPRM). As a result of these comments, we revised the final regulations to clarify and modify several definitions, as well as the interpretive guidance in the Appendix.

Prior to both the NPRM and issuance of the final regulations, EEOC held briefings for Congressional staff, representatives of disability rights and employer organizations and the media. Since publication, the commission has distributed over 15,000 copies of the final regulations which are available also in braille and large print, and on audio tape and computer diskette.

In addition, EEOC's existing regulations for record keeping and reporting under Title VII of the Civil Rights Act of 1964 were modified and amended to reflect employers' record keeping responsibilities under the ADA.

To remedy the fact that no accurate or precise data exist on the employment status of Americans with disabilities, the commission is developing a data collection process on a pilot survey basis. The questionnaire will be a "scannable" self-identification form. The findings of this pilot survey will serve as the basis for future policy evaluations and assessment decisions about data collection under the ADA and will be used to design a complete census of EEO–1 employers, i.e., employers with 100 or more employees, if that is deemed necessary.

By January 26, 1992, the Commission will publish in the *Federal Register* final coordination regulations between EEOC and the Department of Labor to set forth procedures governing the processing of complaints that fall within the overlapping jurisdiction of Title I of the ADA and Section 503 of the Rehabilitation Act. The Notice of Proposed Rulemaking was published in the *Federal Register* this past Monday, October 28 for a 30-day public comment period.

Similar coordination regulations between the Commission and the Department of Justice will address potential enforcement conflicts between the ADA and Section 504 of the Rehabilitation Act. EEOC has engaged in intensive negotiations with the Department of Justice and is working out the details of a coordination regulation. We fully expect to publish a proposed regulation sufficiently in advance of the statutory deadline.

The purpose of the coordination regulations is to ensure that overlapping complaints are dealt with in a manner that avoids duplication of effort and prevents the imposition of inconsistent or conflicting standards.

We also established an ADA Services unit within the Office of Legal Counsel, with a Policy Division and a Technical Assistance Division. The unit provides policy guidance and technical assistance to EEOC's employees and to the public.

Consistent with this mission, the commission is developing several new sections of its compliance manual that will focus on key issues under the ADA such as, the definition of a "disability," the definition of a "qualified individual with a disability," reasonable accommodation and undue hardship, and theories of discrimination. The Commission is also developing a policy guidance on preemployment inquiries. These compliance manual sections, while aimed at instructing our investigators and lawyers in our field offices, will also be available to the public. The manual also guides our offices regarding charge processing procedures and is being modified to include the ADA. Compliance manuals are available in our field offices, Headquarters library and through commercial publishers.

Training

The Commission was actively involved during Congressional consideration of the Americans with Disabilities Act in providing technical assistance to both the White House and committees of the House and Senate based on our experience with Section 501 of the Rehabilitation Act of 1973. However, on a Commission-wide level, the experience of our total work force with disability law is somewhat limited.

Since 1979, EEOC has had overall responsibility for the Federal sector equal employment opportunity complaint processing system. However, only EEOC administrative judges (who hold hearings on Federal complaints of discrimination) and staff in our Office of Federal Operations (OFO) (who decide Federal complaints at the appellate level) have had any experience in resolving complaints filed on the basis of physical or mental disability. These complaints are filed under the Rehabilitation Act and Federal regulations under that act.

In our role as an administrative appellate body, the commission reviews appeals in Federal sector EEO cases from Final Agency Decisions. In the past 11 years, the Commission has accordingly reviewed and decided thousands of cases in which discrimination on the basis of disability has been alleged. In fiscal year 1990 alone, appeals filed under the Rehabilitation Act constituted approximately 15 percent of OFO's intake.

EEOC also has responsibility for implementing Section 501 provisions that require Federal agencies to take affirmative action in the employment and advancement of individuals with disabilities and that prohibit discrimination on the basis of disability. Pursuant to Section 501, the commission reviews the affirmative action employment plans of Federal agencies.

Finally, under Executive Order 12067, the Commission also is responsible for ensuring consistency of legal standards and avoiding duplication of efforts in the enforcement of all Federal equal employment opportunity laws. Under its Executive Order responsibilities, the Commission has reviewed the employment nondiscrimination provisions of proposed and final regulations to implement section 504 of the Rehabilitation Act in federally assisted and conducted programs.

Because EEOC's experience and expertise in disability discrimination law is limited to a small portion of our total work force, effective training of our employees is essential to the enforcement of the new law. The ADA is a complex statute which will require a different approach to investigations than under the other laws EEOC enforces and will require intensive training of investigators before charges begin to enter the administrative process in July 1992.

EEOC's available funds for training in recent years have been minimal. For instance, EEOC had only $16.82 per employee to spend on training in fiscal year 1990. In fact, EEOC has not been able to have a comprehensive training program since 1987. However, in fiscal year 1991, we were able to spend $1.2 million to provide some initial training to EEOC staff. As part of this effort, Headquarters management staff also developed training videos to provide ongoing on-the-job training to the staff.

Early in 1990 EEOC began collecting disability training and technical assistance materials from Federal, State and private sources, and we developed a computerized information library of these resources. In addition, EEOC surveyed Fair Employment Practices Agencies (FEPAs) to learn what their experiences have been in enforcing State employment discrimination statutes similar to the ADA and, through their experience, to develop estimates for the impact on EEOC enforcement. EEOC then distributed policy guidance to EEOC field offices, summaries of other State and Federal laws prohibiting disability-based discrimination, and contacts for making referrals to appropriate agencies. EEOC also designated a contact person in each of our district offices to coordinate all ADA-related internal training and outreach.

To prepare our investigative and litigation units for the anticipated 20 percent increase in charges when the ADA becomes effective for employers with 25 or more employees next July, the Commission has embarked upon a comprehensive program of staff training. This training represents the largest single training effort ever undertaken by the Commission as the result of the passage of new legislation.

EEOC conducted introductory ADA training for field and headquarters managers and supervisors. In addition, a training workgroup was established to plan and implement an ADA training program for EEOC investigators and legal staff.

Training on ADA regulations for all staff will begin in mid November. EEOC plans intensive training in ADA investigations for field enforcement and litigation staff. We are currently developing a training curriculum. Presentation materials will be finalized in January and February; the presenters will be trained in March; and the 1-week training sessions will begin in April of 1992. Upon implementation of the ADA, all staff will have completed training.

Technical Assistance

Congress mandated that the ADA enforcement agencies provide technical assistance to employers and individuals with disabilities so that all concerned may learn of their rights and responsibilities under the new law. The Commission expects that its technical assistance efforts will result in greater compliance with the ADA's em-

ployment requirements, with a corresponding reduction in the need to resort to enforcement activity.

In December 1990, the Commission's draft Technical Assistance plan was published in the *Federal Register*. An interagency ADA technical assistance coordinating group was established, chaired by EEOC. other member agencies include: the Department of Justice; the President's Committee on Employment of People with Disabilities; and the National Institute on Disability and Rehabilitation Research and the Rehabilitation services Administration in the Department of Education.

Through its fiscal year 1991 budget and a supplemental appropriation, EEOC has received $4.6 million in appropriations for technical assistance activities. The funds will be used on a variety of technical assistance activities with emphasis on training for employers and for individuals with disabilities. The Commission also will utilize a wide range of media and video formats to provide employers with training and information on their responsibilities, and to encourage voluntary compliance with the law.

EEOC also held informal consultations with national organizations representing employers and people with disabilities to elicit suggestions for technical assistance programs and a technical assistance manual. We also conducted focus groups to learn what employers wanted to know about the ADA and in what format they wanted to receive the information.

Employers and other covered entities are actively encouraged to seek information and assistance to maximize voluntary compliance. The Commission's technical assistance program will be separate and distinct from its enforcement responsibilities. Accordingly, employers and others who request information or assistance regarding a particular aspect of compliance, or who participate in training conducted by the Commission, will not be subject to investigation or other enforcement action on the basis of such inquiries or participation.

The Commission's technical assistance program includes the development of informational materials and training for employers, individuals with disabilities and the public, and assistance in response to individual requests. The program is designed to provide information needed for compliance with the law to all those covered by Title I legal requirements. However, in allocating limited resources, priority will be given to providing technical assistance to targeted audiences. For example, smaller employers generally have not had previous experience in meeting the nondiscrimination requirements of the Rehabilitation Act, which applies to larger employers who are Federal contractors or grantees. In addition, smaller employers have little access to information and assistance provided by commercial consulting services.

Activities to inform people with disabilities about their ADA rights and how to exercise them also will receive priority. Because it will be difficult to reach millions of persons with differing disabilities, the Commission intends to utilize the networks of organizations such as independent living centers, State vocational rehabilitation agencies and many other public and private agencies that work with people with disabilities to provide information and assistance on the law.

In addition to its own technical assistance activities, EEOC will continue to encourage and assist technical assistance conducted by other Federal agencies and by organizations representing employers and individuals with disabilities. In fact, tonight I will be attending a meeting of grantees selected by the National Institute on Disability and Rehabilitation Research, the Department of Justice, and the Rehabilitation Services Administration to provide training and technical assistance nationwide to employers, individuals with disabilities, and rehabilitation professionals on the ADA. EEOC staff will participate in this two-day coordinating effort.

EEOC also will reach virtually all employers covered by the ADA through a joint mailing effort with the Internal Revenue Service. In February 1992, a notice will be inserted in the IRS' quarterly mailing to employers stating the effective dates for the ADA and advising them of where more information is available on their responsibilities under the ADA.

The Commission will announce soon a joint Department of Justice/EEOC nationwide training program to provide extensive training of individuals with disabilities in the requirements of Titles I, II and III of the act and techniques in providing technical assistance and alternative dispute resolution.

The contractor will provide intensive 1-week training workshops to 400 persons with disabilities on their rights under Titles I, II, and III of the ADA. After completing their training, each of the 400 trainees will be required to provide ADA training and technical assistance to at least 50 other persons with disabilities and 30 employers and other covered entities. A select group of 100 of the 400 trainees will receive further, advanced training in Title I only. In addition to the ADA instruction, these individuals will receive training in alternative dispute resolution and will be avail-

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able to assist EEOC offices and employers in resolving ADA disputes. The contract is expected to be awarded shortly, and training should begin in January 1992.

The commission also plans to let a contract to train employers on their obligations under the ADA. The contractor will develop and provide six to ten regional, one-day seminars to train 6,000 to 10,000 employers on their obligations under Title I of the ADA using EEOC-approved training materials and videos. We are currently preparing a Request for Proposals and anticipate beginning training in February 1992.

The ADA mandates that a technical assistance manual be published by January 26, 1992, 6 months prior to the effective date of Title I. The EEOC Technical Assistance Manual will be completed by that date. The manual will be a major "how to" resource for employers and persons with disabilities. It will explain the legal requirements of the statute and regulations as they apply to specific employment practices, and will include guidance on reasonable accommodation, as well as detailed guidance and examples of other important aspects of compliance. The manual also will include a directory of technical assistance resources for reasonable accommodation, accessibility, and other aspects of compliance to assist employers and persons with disabilities in locating private and public entities skilled in disability employment issues. EEOC intends to publish the manual in a form that can be updated with supplements as the Commission issues further guidance on specific issues, and as additional technical assistance references and resources become available. The manual will be made available to the public at minimal cost and reference copies will be available at EEOC's headquarters, the Commission's 50 field offices, in public libraries and in Federal depository libraries. In addition, the manual will be available in accessible formats for persons with visual or manual disabilities.

Consistent with our mandate to provide technical assistance to the universe of more than 666,000 employers and some portion of the estimated 43 million individuals with disabilities who need and request technical assistance, we are proposing to establish a Technical Assistance Revolving Fund. This fund is a reflection of our earnest pursuit to establish creative and deficit-neutral means whereby EEOC can provide maximum technical assistance to meet the demands of a diverse and growing population.

Similar to other governmental revolving funds, the Technical Assistance Revolving Fund will be supported primarily from collections and payments received from recipients of technical assistance training and materials. Initial start-up funding will be provided by a one-time transfer of up to $1 million from EEOC's Salaries and Expenses Account to the ADA Technical Assistance Account. Of that amount? approximately $525,000 will be used for one-time capital investments (i.e., facility space rental, equipment and related expenses). Approximately $475,000 will be used for Fund start-up costs.

Historically, and currently, EEOC has faced years of curtailed funding and changing priorities. These forces have circumvented the development and institutionalization of a solid technical assistance and training program within the commission. We are truly excited about the potential establishment of the Revolving Fund. Such a fund will ensure an ongoing institutionalization of a direly needed technical assistance program.

EEOC will channel a small number of existing employees to serve in various capacities such as: course designers and developers, trainers, career development specialists, and functional area specialists and support staff. The Fund staff will develop and provide a variety of services and products including: training, seminars, speakers, workshops, conferences, audio and video tapes, manuals, digests, and other printed materials.

Given the active and current demands for technical assistance already evident to EEOC, we believe that the Fund will become solvent within 2 years.

To date, we have received considerable support for the establishment of this Fund from both the House and the Senate. In fact, our fiscal year 1992 Appropriations Conference Report language reiterates support for this Fund. We greatly appreciate your assistance in amending the appropriate legislative vehicle to establish the Fund.

Another component of the Commission's technical assistance program is its outreach efforts. EEOC sees public outreach and public awareness as crucial to the successful implementation of ADA. In addition to responding to requests for more than 15,000 copies of the final rules since last July, EEOC has written two booklets titled *ADA: Your Employment Rights as an Individual with a Disability*, and *ADA: Your Responsibilities as an Employer*. EEOC has distributed 5,000 copies of each booklet in just 1 month. These booklets are available in Spanish and alternate formats of braille, large print, audio tape, and computer disk. EEOC has also, in conjunction

with DOJ, published *Questions and Answers on the ADA*, which focuses on Titles I and III. This publication is available in both Spanish and English and answers common questions regarding the employment and public accommodations provisions of the act. Copies of these publications were recently mailed to each Member of Congress to assist them with their constituent services.

The Library maintains a collection of ADA materials and has published a guide; *Library Resources on the Employment of Individuals with Disabilities*, which includes books, periodicals and videotapes. EEOC has also produced an open-captioned video titled, *Expanding Equal Opportunities: Implementing the Americans with Disabilities Act*. The video is available for purchase from the National Audiovisual Center.

EEOC maintains a speakers bureau which provides, upon request, trained speakers from headquarters and the field offices to explain the ADA. EEOC has 33 speakers available to provide presentations to various groups. From July 1990 to October 1991, EEOC headquarters and field staff provided more than 400 presentations to organizations such as employer groups, disability groups, Federal agencies, hospitals, bar associations, universities and human resource organizations.

An *ADA Handbook*, which includes annotated versions of the regulations and interpretive language for the employment and public accommodations regulations of the act and a resource list, will be available for public distribution early next month. The Handbook will serve as a basic resource document. The Commission estimates that approximately 20,000 copies of the Handbook will be disseminated. An advance copy has been made available to each member of the subcommittee this morning.

Beginning November 8, the Commission will establish an ADA Helpline as a part of its toll-free 800 service. The Helpline will enable individuals to order EEOC publications and information, as well as talk to agency staff about ADA issues. The new toll-free number will be 800-669-EEOC. The TDD number will be 800-800-3302.

The Commission will expand public information and technical assistance activities as the effective date of Title I approaches. Public service announcements will be aired on radio and television, additional information will be provided to a broad range of general and specialized media, and Commission speakers will participate in radio, television, organizational and other forums throughout the country to clarify legal requirements.

EEOC will continue to provide technical assistance after the ADA becomes effective, through additional informational materials, training activities and responses to requests for information and assistance. The Commission will continue to work closely with disability groups, employer organizations, and other Federal agencies, utilizing their resources and information networks to supplement its own technical assistance activities and to provide specialized assistance that will aid compliance with the employment requirements of the ADA.

Later this fall, a technical assistance program will be established in each of the Commission's 23 district offices. The staff in these positions will provide technical assistance to employers and individuals with disabilities regarding rights and responsibilities under the ADA, coordinate internal and external training and facilitate general outreach activities in their communities.

In addition, a request for proposal will be issued shortly to conduct a pilot program on Alternative Dispute Resolution in five of EEOC's district offices. This effort is an attempt to further voluntary compliance and to reduce the impact of inadequate enforcement resources.

Charge Data System/ADATS

Improvements to EEOC's computerized tracking systems began in 1986 and, since then, have been developed and improved. These systems have allowed the agency to establish tracking programs for past and current records.

The staff now has access to modern data processing equipment. Although additional funds have not been appropriated for this purpose, EEOC has been purchasing a number of computers for our field offices annually. The Charge Data System (CDS) allows each office to enter the history of every charge filed with EEOC. The information contained in each office's CDS system is transmitted to headquarters to the agency's National Data Base (NDB). This system allows management to monitor the Nationwide processing of all charges and to provide instructions, where necessary, to better administer the agency's workload. While there are some further refinements to make to the NDB, the system has proved to be an effective management tool and will play an integral part in monitoring ADA charges.

The improvements in our computer systems have also provided EEOC with the tools to develop a comprehensive case management system. A series of programs

were developed allowing every supervisor and Field Director to monitor the movement of charges by unit and office. There are specific programs by which managers can request lists of charges by date of alleged violation or by expiration date of the filing suit rights.

Another technological initiative taken by the Commission was to automate our ADA implementation efforts. Prior to the signing of the ADA, EEOC developed the ADA Tracking System (ADATS) to follow the progress and completion of ADA workplan activities and projects. Through this system, we can easily monitor our progress in implementing the ADA and ensure that all actions are taken in a timely manner.

Enforcement

EEOC currently receives about 60,000 charges of discrimination each year under Title VII, the Equal Pay Act and the Age Discrimination in Employment Act. State and local agencies receive about another 55,000 charges under similar statutes. EEOC's pending inventory of charges (the number of charges it currently has to process) is about 45,000 charges and FEPAs have about 70,000 charges in their inventories. EEOC's current average processing time is about 250 days, down from an average processing time of 295 days just 2 years ago. In fiscal year 1991, EEOC's investigators resolved an average of 88 charges. Despite this high resolution rate, each of EEOC's investigators still had an average 59 cases pending investigation when EEOC opened its doors on the first day of fiscal year 1992. Once the ADA takes effect, we expect that there will be a 20 percent increase in our workload or about 12,000 additional charges a year. To avoid the serious backlog problems that EEOC experienced in the late 1970s, it is essential that the Commission receive adequate funding for ADA enforcement.

Our field offices investigate and resolve about 62,000 charges of discrimination annually. When, through these investigations, we determine that discrimination has occurred, we attempt to obtain appropriate remedial relief through informal discussion called conciliation. If conciliation fails, the Commission, at headquarters, will consider litigation against the employer. However, when the employer is a State or local governmental entity, the Commission will recommend that the Justice Department consider litigation.

We anticipate that there will be approximately a 20 percent increase in the number of suits filed by EEOC as a result of the full implementation of the ADA. However, this projection does not fully reflect the actual increase in attorney workload. A major portion of each attorney's time will be directed toward learning the statute, training investigators, identifying new expert witnesses and developing new litigation strategies.

Past EEOC experience has demonstrated that the assumption of new statutory authority results in litigation over definitions which must be resolved in the courts of appeals. Thus, workload in the Office of General Counsel, Appellate Services, is expected to increase. Until these definitions and other issues are resolved, a significant portion of the litigation will be conducted at the appellate level.

Most long-term litigation will be conducted by field office legal division staff. In addition to their litigation responsibilities, staff in these offices will be required to provide day-today guidance to enforcement staff. During the short-term, the Commission will need to identify experts for use in future, complex litigation of cases brought under the ADA. We estimate that ADA litigation may require at least three specialists in the Office of General Counsel to identify these future procurement needs and specific academic and medical disciplines which will be used in long-term litigation.

EEOC's Office of General Counsel anticipates that a significant portion of the ADA cases will require the use of medical, architectural, ergonomics or vocational specialists. These experts will be called on to provide advice and guidance on general and specific ADA issues and to provide specific advice and testimony in certain cases.

Experience gained in litigating the Age Discrimination in Employment Act-Bona Fide Occupational Qualification cases in the mid-1980s will be invaluable to the commission in conducting ADA litigation. These cases also involved complex, technical issues and required reliance on a number of expert witnesses. Many of the ADEA-BFOQ suits were resolved only after full trial on the merits or after extensive discovery and deposition testimony. As such, they were expensive and difficult to litigate. In many instances, they required a team of lawyers from the legal division and, if warranted by the circumstances of the case, from headquarters or other district office legal divisions.

Some of the most successful prosecutions of these cases used trial teams comprised of senior attorneys from two or three field offices—each with expertise in examination of one medical or expert specialty—and from headquarters.

The current average amount available per case to litigate is $5,000. However, this average under-represents certain critical needs and vastly over-represents other requirements. A substantial portion of the litigation support budget is used to support major class action cases. For example, in fiscal year 1990, 40 cases or just 5 percent of the 875 cases in litigation required 60 percent of the total litigation support budget. Over 22 percent of the total budget was used to support just five cases.

EEOC obligated $2.8 million for litigation support in fiscal year 1990. The Office of General Counsel had only $1,400 to support each "routine case," since 40 major cases required an average of $43,500 each. The differences among cases is even more apparent in the fact that five large cases required an average of $132,500 each.

The litigation support requirement for litigation of ADA cases may be as high as $96,000 per case. This estimate is based on experience with ADEA suits involving law enforcement officials where the defendant argued that the age distribution at issue was justified as a bona fide occupational qualification because of medical or psychological reasons. The reliance on the use of expert witnesses in such cases requires contracts ranging from $16,000 to $32,000. Assuming four experts per case, the cost could reach an average of $96,000 for a major case.

Budget/Staffing

EEOC's ability to resolve charges has been hampered by staffing decreases in recent years. The agency's 1988 full time equivalent (FTE) staff level of 3,168 dropped to 2,796 FTE by fiscal year 1991. Thus, EEOC has had more than a 10 percent decline in staff resources in 4 years. The agency's field investigative staff totaled 949 in fiscal year 1988. In fiscal year 1991, EEOC had 779 investigative staff. For 5 of the last 7 years, the agency's budget has been cut below the President's funding request for the commission.

EEOC's successes in reducing its inventory have been achieved through increasing the agency's overall efficiency and productivity. EEOC's outstanding level of productivity, however, is not sufficient to continue this trend; staffing resources must remain at a certain level. Without an appropriate number of investigators, EEOC cannot sustain our current control of inventory and our practice of resolving all charging parties' allegations in a timely manner.

EEOC requested $210 million for its fiscal year 1992 budget. As part of our fiscal year 1992 budget request, EEOC asked for 32 additional FTE. These 32 additional employees will be investigators at a GS–7, 9 or 11 level in the field.

In addition to the new positions made available through our fiscal year 1992 appropriations, I have committed the agency to the transfer of positions from the agency's Headquarters to our 50 field offices throughout the Nation. These additional staff in the field will help offset the increase in charges we will receive under the new act next year. EEOC will also create technical assistance positions in each of its 23 district offices. The technical assistance program will enhance EEOC's service to the public under all statutes EEOC enforces.

State and Local Fair Employment Practices Agencies (FEPAs)

A discussion of EEOC's ADA enforcement strategy is not complete without addressing EEOC's relationship with the State and local agencies. Currently, under Title VII and the ADEA, State and local agencies have an active role to play in processing discrimination charges. This application of the concept of federalism permits State and local governments to continue their efforts to eradicate discrimination under their statutes which preserve Federal rights in the work place.

Worksharing agreements with FEPAs, however, are considered essential to handle the enormous volume of charges within the limited budgetary resources of the EEOC. In worksharing agreements and contracts with the EEOC, State and local agencies resolve charges for EEOC under State and local statutes.

EEOC enters into annual worksharing agreements and contracts to maximize the efficiency of both State and Federal efforts and to avoid wasteful delay and duplication of efforts. Congress earmarked $25 million in fiscal year 1991 and fiscal year 1992 specifically for this effort. Currently, EEOC pays a FEPA $450 for each contract charge completed. EEOC contracts for only a portion of a FEPA's total workload based on a formula to evenly distribute the funds among the States. These agreements often provide that each agency will be an agent of the other for the purpose of receiving charges. When a charge is received first by a FEPA with which EEOC has a worksharing agreement, the FEPA files and processes the charge under its anti-discrimination law. Under the worksharing agreement, the State filing also

constitutes a technical filing of a Federal discrimination charge under the statutes that EEOC enforces. The latter charge is not filed for the purpose of initiating a separate Federal investigation but rather to preserve the charging party's right to file a private lawsuit in Federal district court, and to preserve the charging party's option to have EEOC investigate the charge. This is known as dual filing.

Within this legal framework, the EEOC's ability to control the processing of charges by FEPAs is limited. Created by and answerable only to State or local governments, the FEPAs are independent of the EEOC's direct supervision over their budgeting or staffing.

EEOC is working to implement a uniform case management system in the FEPAs to assist in investigating, tracking and monitoring of charges. In fiscal year 1992, the Commission will provide the same case management training given to EEOC supervisors for FEPA enforcement managers.

I have established a State and Local Division in the proposed Charge Resolution and Review Program that will allow more centralized EEOC influence over the FEPA operation and allow additional review of the quality of FEPAs' charge resolutions. With the addition of more personnel, the strengthened State and Local Division will be better informed of the needs of the FEPAs so that the partnership between the EEOC and the FEPAs will be more productive than in the past. In order to assist in their day-today work with the FEPAs, the EEOC plans to add staff to the State and local coordination units in the district offices.

Generally speaking, FEPAs have had experience enforcing laws prohibiting discrimination on the basis of disability. Forty-six States and the District of Columbia have laws similar to the ADA. Many of the States have been enforcing these laws for 10 to 15 years. Because most States currently have disability laws, the impact of the ADA on FEPA workloads should be minimal when compared to the dramatic increase EEOC anticipates in its workload.

We are currently in the process of determining the methods and means through which the deferral relationship will be developed. The law permits written agreements with State and local authorities to establish effective and integrated resolution procedures and to pay for services to assist the Commission in carrying out this title. The financial and personnel resource implications of such an undertaking need to be examined.

During this fiscal year, we will conduct an in-depth study of State laws addressing disability discrimination and FEPA practices in resolving charges under these State laws. We expect to provide guidance to FEPA directors on ADA practices and procedures during an upcoming FEPA Directors Conference and in our quarterly memoranda that highlight EEOC/FEPA relationship issues. The FEPAs will also assist in conducting six seminars for employers on current employment discrimination topics under a contract with the International Association of Official Human Rights Agencies.

Mr. Chairman and members of the subcommittee, I hope my discussion of EEOC's strategy for implementing the ADA has been helpful to you in understanding the important challenges that face the Commission. EEOC is proud of its efforts toward being fully prepared to vigorously enforce this law when it takes effect next July and to ensuring that individuals with disabilities and employers are aware of their new rights and responsibilities.

I will be happy to answer any questions you may have.

Chairman PERKINS. Thank you, Mr. Chairman.

I greatly appreciate your statement today. I was struck as I was listening to you over and over again by the problems that seem to be related directly to the amount of money available to the EEOC.

You talked about from 1985 through 1990, the strangulation of the budget that was available for EEOC. And you talked about the chilling effect that would occur with further budget cuts.

I'm interested, with the ADA coming on line, in the new amounts of training that you mentioned in your statement that are going to be necessary with the addition of a large number of new cases.

What resources, monetarily, financially, does the EEOC need to fully implement the ADA?

Mr. KEMP. Historically, EEOC has had budget problems. In fact, I can imagine when the 1964 Civil Rights Act was being debated,

northern congressmen maybe went to southern congressmen and asked for their vote, and said, if you vote for this Civil Rights Act, I promise that I won't vote for funding for the agency that is going to be set up to enforce it.

Nine years out of 10, our budget was cut by Congress during the 1980s. This had a ratcheting effect. OMB's budget that was sent over was cut. So when it was cut, OMB, the next year, would cut it back further.

If we just had the more than $50 million that the President asked for in the 1980s, we'd be in a whole lot better shape.

We're closing roughly 88.4 cases per investigator.

Chairman PERKINS. You indicated that you had another 50 cases per investigator.

Mr. KEMP. When we opened on October 1.

Chairman PERKINS. Right. Not counting the new cases that are coming in. What are the rate of the new cases that are coming in presently?

Mr. KEMP. We expect about a 20 percent increase on July 26. That will be about 12,000 cases.

The way we've arrived at that is——

Chairman PERKINS. Twelve thousand new cases?

Mr. KEMP. New cases.

Chairman PERKINS. In addition to what is already coming?

Mr. KEMP. Yes—under the ADA.

Basically, the way we arrived at that figure is that we studied what the State agencies had—it was roughly 9 percent of their budget—and we made an equation and applied that to arrive at what we would get. We usually do get between 5 and 10 percent more at our agencies and State agencies, and that comes out to about 12,000.

Chairman PERKINS. I understand.

What I'm really trying to do, and I'm trying really hard not to be in any fashion partisan.

Mr. GUNDERSON. I appreciate that.

Chairman PERKINS. I thought you might.

I really am. What can I say—bipartisan.

What I'm trying to arrive at is the real number, the financial figure, that you think, based upon all the new situations that are going to be confronting this piece of legislation and operation of your agency, what financial figure is going to be necessary to implement this law and these regulations so that they're going to work as smoothly, so that they're going to work in a fashion that we in Congress, and I think the President, intended, when this act was promulgated?

Mr. KEMP. I can't comment on our 1993 budget request because that's before OMB.

I do think that we need to double the number of investigators that we have out in the field.

Chairman PERKINS. You think you're going to need to double the number of investigators in the field?

Mr. KEMP. What?

Chairman PERKINS. Double the number of present number of investigators in the field?

Mr. KEMP. Yes. But we've got to get down to each investigator completing 40 cases a year. I think that's the upper level to do an adequate job.

Chairman PERKINS. So you think any more than 40, they can't really do an adequate job?

Mr. KEMP. Yes.

Chairman PERKINS. Yes, I think you're right.

Go ahead.

Mr. KEMP. This is an effect on Title VII, Equal Pay Act, and ADEA—it cuts across the board.

We've got to allocate the money fairly. We can't favor one group over another.

Chairman PERKINS. So in terms of your 1992 budget that you submitted to OMB, that's not in front of it now?

Mr. KEMP. No. We asked for $24 million more for ADA. We asked for 246 investigators, basically for ADA. We got $4 million and we got 32 added employees.

Chairman PERKINS. So you asked for $24 million and you got $4 million, and you asked for—what was the other figure?

Mr. KEMP. Two hundred forty-six.

Chairman PERKINS. And you got?

Mr. KEMP. Thirty-two.

Chairman PERKINS. That seems to me given the current situation you've described to me, you seem to believe we're going to have some fairly serious problems of implementation with the program as we're presently proceeding?

Mr. KEMP. I think we'd have very serious problems at EEOC even if we didn't have ADA and the 20 percent increase in workload.

Chairman PERKINS. And the 20 percent is just that much more?

Mr. KEMP. Yes. That might be the straw that breaks the camel's back.

Chairman PERKINS. That's very distressing to hear, Mr. Chairman. I appreciate your honesty and your candor with me, and I think that's very much appreciated again on my part.

We will probably come back to this a little bit later.

Just quickly, I appreciate very much the Handbook. Now the manual that's mandated, I think in your testimony, as I recall, you said that it was going to be available 6 months prior to the implementation of the act.

When that manual is available, how is an individual or a business entity going to acquire it?

Mr. KEMP. I should ask some of my staff.

Chairman PERKINS. Feel free to.

Mr. KEMP. Liz, do you want to come up?

Chairman PERKINS. Could you identify yourself, please?

Ms. THORNTON. I'm Elizabeth Thornton, Deputy Legal Counsel.

The manual will be available on January 26—this coming January. It will be available to the public—it will be in alternative formats if people need them. People probably will request it and then we will make it available by mailing it out.

Chairman PERKINS. Are you going to charge for that or is this going to be free?

Ms. THORNTON. We're discussing that at the moment. Clearly, initially, there will be copies that will be made available for free. After that, it may be necessary for the agency to charge. However, the first copies for everyone will be available——

Chairman PERKINS. When you get a copy of the manual's table of contents, could you submit that to our subcommittee for review?

Ms. THORNTON. Certainly.

Chairman PERKINS. I would really appreciate that.

I have a lot of other questions but I'd like to come back a little bit later, and turn to Mr. Gunderson to see what questions that he would like to ask.

Mr. GUNDERSON. Thank you very much, Mr. Chairman.

I want to follow up on the interest in the Technical Assistance Manual. For better or for worse, that was my idea in ADA. I think it's going to be for the better.

Is that going to be bigger than the Handbook?

Mr. KEMP. I don't know.

Ms. THORNTON. I'm sorry, I didn't hear you.

Mr. GUNDERSON. Is the Technical Assistance Manual going to be bigger than the Handbook?

Ms. THORNTON. Yes, eventually. It's going to have a number of sections. It's going to have a "How to" section in the first part and then the second half will be a resource guide, which will tell people where they can go—the different organizations they can go to to get help.

Mr. GUNDERSON. I think the paper industry owes me commission. I had no idea. This is very helpful and, frankly, very impressive.

I have to tell you both and to all your staff that's here as well, Mr. Chairman.

What a pleasure it is to see this kind of intense commitment and enthusiasm to trying to make this happen. Normally, these hearings, as you know, are, by their nature, adversarial. And this doesn't mean we agree on every specific regulation and issue.

But you need to be commended, and be commended publicly, for what you have done here, and I just want to start off in that regard.

Mr. KEMP. I think our employees have to be commended. They are terribly impressive. I did work for the Federal Government for 16 years with the Internal Revenue Service and the Securities and Exchange Commission, and I do think our employees are much better. And the IRS and SEC are supposedly the two of the best agencies in the Federal Government.

I'm not knocking the IRS or SEC.

Mr. GUNDERSON. You can knock the IRS, it's okay.

[Laughter.]

Mr. ANDREWS. Not the SEC.

Mr. GUNDERSON. The reality is, I would guess every one of us here has been recognized at some point in time as Legislator of the Year by some disability group. I would hope every one of those disability groups, especially those in the audience, would go back to their members and their organizations and consider this year making the Legislator of the Year the people who are pursuing in the trenches the implementation of this. I mean that very sincerely, to each and every one of you.

Let's talk about this Revolving Fund. I know you're going to get a million dollars for startup.

Mr. KEMP. A million dollars from our——

Mr. GUNDERSON. A transfer—for a million dollars to start up.

Then where does the money come from?

Mr. KEMP. I'd like to have Kassie Billingsley answer.

Mr. GUNDERSON. You'd like to know that, too?

Mr. KEMP. It's very technical.

Mr. GUNDERSON. Can we ask you as well, for the record, to identify yourself just so we know who you are.

Ms. BILLINGSLEY. My name is Kassie Billingsley, and I'm the Director of Financial and Resource Management Services at the Equal Employment Opportunity Commission.

The nature of a Revolving Fund is like a business account. Based upon collections coming into the Fund, it becomes solvent over time, hopefully if you have a product and services that there's a demand for.

In the government there are dozens and dozens of Revolving Funds in some of the prior agencies I've been with—the State Department, United States Coast Guard—we've had Revolving Funds. So with this particular Fund, after the $1 million initial startup cost, we're hoping that based on the training, the workshops, the conferences, that we're able to supply based on the demand of the public, that we would generate enough monies to keep the account going.

Mr. GUNDERSON. You don't have a fee schedule established at this point, however?

Ms. BILLINGSLEY. We definitely have some standard rate fee formulas. We do not have the precise fee schedules yet determined, but that's something that my staff is actually working on right now with the Department of Treasury and with the Office of Management and Budget.

Mr. GUNDERSON. I think it would be helpful if, at your earliest convenience, you could share that with the subcommittee—and I'm trying to be helpful in getting you the resources you need; but at the same time, I think we want to know before July 26, what are going to be the financial implications for the small business that is going to seek your assistance; what is it going to cost them to get the kind of assistance they need to comply. That may or may not be something that we have to look at, and we won't know that until you give us some overview of what that fee schedule is.

Ms. BILLINGSLEY. We'd be very happy to supply—what we do have right now are some reimbursable agreements that we have with other Federal agencies that have requested training of our agency. And I might say that we have not been able to come close to meeting the demand of brethren Federal agencies.

But essentially, those standard rates will be the same type of rates that we would be applying to business or private organizations. We certainly can provide that expeditiously to you, sir.

Mr. GUNDERSON. One of the keys in the regulations is the whole area of training. And one of the concerns that the hearing impaired have is whether or not in this area you will include as training materials, films and, whether or not films will be captioned so

that training will be available both to the hearing impaired employee and employer.

Can you clarify this? There's some perception that this is not going to occur in your regulations?

Can you tell me that's not the case and that it will?

Mr. KEMP. They are captioned.

Mr. GUNDERSON. All your training films will be captioned?

Mr. KEMP. Yes.

Ms. BILLINGSLEY. They are now.

Mr. GUNDERSON. They are now? Okay, that's very helpful.

A similar issue, there seems to be a dispute in your proposed regulations versus those of the Department of Justice on the definition of "qualified interpreter."

What are the chances we can get you to accept the Department of Justice's definition of "qualified interpreter?"

Mr. KEMP. We didn't define it. Did they define it in this reg? I don't even know about this controversy.

Mr. GUNDERSON. Let me ask you: is this something that, because the rulemaking process is in order, you can't comment on—not trying to infringe on the rulemaking process?

Mr. KEMP. No, no, I just——

Mr. GUNDERSON. The availability of "interpreter" under the regulations is not sufficient because you have to define "qualified interpreter." Let me, in just a second here, I can pull up—if I may, Mr. Chairman, just read from the Department of Justice's proposed regulations.

Chairman PERKINS. Sure.

Mr. GUNDERSON. "In order to clarify what is meant by 'qualified interpreter,' the Department has added a definition to the terms to the final rule. A 'qualified interpreter' means an interpreter who is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary."

So we're not only dealing with the issue of availability of interpreters, but we're dealing with the issue of qualified interpreters—availability of qualified interpreters.

Would there be any problem reconciling the original EEOC regulations with the Department of Justice regs on this, that you know of?

Ms. THORNTON. We didn't define "qualified interpreter" in our regulation. I think our intent was not to require, for very small businesses, that all interpreters be certified if in fact the ability to sign or to accommodate the individual was able to be done.

So that I don't think there is necessarily a conflict. Our purpose is that if the accommodation works for the particular individual with a disability and it doesn't cause an undue hardship on the employer, then it obviously is good.

Mr. GUNDERSON. But can't you not, in the regulations, define "qualified interpreter" without requiring certification in the regulations?

Ms. THORNTON. I don't think at this point we would want to go back and amend the regulation, but we certainly can do something sub-regulatory. We're doing an extensive Compliance Manual section. And those kind of issues will be dealt with in that document.

Mr. GUNDERSON. So you believe we can solve the "qualified interpreter" issue in the Compliance Manual?

Ms. THORNTON. Yes, definitely.

Mr. KEMP. Let me just enter into this.

I am not aware of this controversy. But it does seem somewhat of a controversy concerning attendants for people with mobility impairments, that all sorts of proposals that they be trained in this and that and the other thing. And they never consider the needs of the person that needs the attending care, which doesn't mean that they have to be certified this, that or the other thing. The key thing is that they're dependable.

I don't know if we're not getting into an argument between groups in the deaf community, and maybe we should try to avoid that. I'd like your advice on it.

Mr. GUNDERSON. I don't want the Federal Government to get into the business of certifying interpreters.

Mr. KEMP. I don't either.

Mr. GUNDERSON. I agree with you on that.

At the same time, I think we have to suggest that we have more than just the availability of an interpreter. I will tell you that I have taken sign language 101, and I have had, frankly, the exhilarating privilege of interpreting both for flight attendants on airplanes and for some constituents who happened to have been hearing impaired.

I am not a qualified interpreter, and I wouldn't want anyone to call me an interpreter or to consider that my attendance at any event met the need of having an interpreter available.

That's the only concern I have, is that we deal with this issue of some level of competence without dealing with the issue of certification. I don't have any dispute with dealing with this in the Compliance Manual, just so that we make it clear that there has to be some basic level.

And, frankly, I'm not asking you to get into the debate over whether you use ASL or not, but that may be a suggestion rather than a mandate, that a certain level of competency in ASL is the way to achieve it. That's just for your consideration.

I think that is probably enough questions from me at this time, Mr. Chairman. I yield back.

Thank you.

Chairman PERKINS. Thank you, Mr. Gunderson.

Mr. Andrews?

Mr. ANDREWS. Thank you, Mr. Chairman.

Mr. Chairman, nice to see you here this morning and the others.

Thank you for a very comprehensive statement and an update. I've had a lot of inquiries from people in my district who have been following this act, and I know they will take your testimony today as good news, as I do, and I appreciate it.

Mr. KEMP. Thank you.

Mr. ANDREWS. You can help me a bit, being new to this and being a lay person at this, if you could answer a lay person's type of question.

After these regulations go into effect, describe for me what would happen for a disabled person who feels that he or she has been denied a promotion by a private employer. Let's assume that I am

a disabled person and I work at a bank and I believe that I've been denied a promotion because of my disability. Where do I go? Who helps me, and what happens?

Mr. KEMP. You come to EEOC and file a charge and say that you were denied a promotion because of your disability. EEOC then investigates the charge. We either find cause or don't find cause. If we find cause, we try to conciliate. If we fail in conciliation, the legal unit in the District Office will send a presentation memo to our Office of General Counsel. The Commission decides whether to sue on the person's behalf.

Mr. ANDREWS. It really goes back to Chairman Perkins' questions earlier, and the concern that I have is whether or not you're being empowered with the tools that you need to do that on a satisfactory basis.

How long do you think a person would have to wait, given the present staffing and resource levels at the Commission for that process that you just described to begin?

Mr. KEMP. There are a couple of things. We are underfunded right now. We're closing 88.4 cases per investigator. We're not going to give priority to any statute. I don't think that's fair.

It's like inflation. Richard Nixon put price controls on in 1971 when inflation was really quite low. At EEOC, the situation just keeps getting worse and worse and worse, and we're handling more cases with fewer employees.

At one point the whole thing will just unravel. It's like inflation—it creeps up, 1 percent, 2 percent, then it's 10 percent; then the next time it's 20 percent, 40 percent, 120 percent. The same thing is happening at EEOC.

Mr. ANDREWS. I think you make a good point, that beyond the quantitative impact of that, there's a qualitative and emotional impact—people give up and they get discouraged when they turn in a bona fide complaint and nothing happens, or it takes a long time for something to happen.

I have, and with the Chairman's consent, I'd like to have entered into the record, a letter from the Director of the Office for Disabled Citizens in Gloucester, New Jersey, one of the counties in my district. Her name is Jacquelyn Love. I asked Ms. Love to call around, sort of take a survey in advance of today's hearing and ask what people thought among advocates in the disabled community.

[The letter of Jacquelyn Love, with attached survey, is included at the end of the hearing.]

The general perception was that there was some pessimism as to whether there was going to be adequate enforcement resources—and that is in no way directed at your efforts. As a matter of fact, as I said earlier, I think the community will take your testimony today as very good news.

With that in mind—you and I have talked before about legislation that I intend to introduce, and I'd like you to comment on it today in this context, that would change the law so that in all of EEOC's activities it would be legally mandated to receive counsel fees and cost of enforcement from the losing or settling party; that we would have a change in the statute where if you brought an enforcement action against someone and either acquired a judgment or a settlement, the statute would require that you collect not only

the damages for the individual plaintiffs or the class, but that you also be awarded the agency's cost of enforcement.

Could you comment on that and whether you think that would help the situation we talked about this morning?

Mr. KEMP. I think anything would help. The best experience that I had before the job as Chairman of EEOC was working for Ralph Nader. As everybody knows, he runs a very tight operation. And that gave me an understanding of running a tight operation.

I think that your proposal would help. At one point I was thinking maybe we should charge for incoming calls where we give assistance, even if it's a nominal charge—have it a 900 number.

Mr. ANDREWS. I don't know that I would support that. My idea really is that if someone has practiced discrimination—if they've broken the law—it strikes me as very fair and efficient and sensible that they should not only pay the cost of the damages for breaking the law but they should pay the public's cost of enforcement to remedy or correct that violation of the law.

It not only creates a source of funding for the EEOC to do more for people who have been victimized by discrimination, it also provides a greater disincentive for people to discriminate, and it provides a stronger and more stern penalty should they violate the law.

Mr. KEMP. I think it would be an excellent idea. I thought you introduced the bill.

Mr. ANDREWS. We are preparing one.

Mr. KEMP. I see, okay.

Mr. ANDREWS. We're preparing one and we wanted to check the scope and, of course, we have to ask the person who runs the administration, Mr. Darman, whether he would support it as well.

I thank you very much for your testimony this morning.

Chairman PERKINS. Thank you, Mr. Andrews.

Mr. Olver, do you have any questions at this time?

Mr. OLVER. I'm not going to presume to suggest that I'm prepared to ask questions here, Mr. Chairman, having just come in about 3 minutes ago. I will read the testimony and communicate with the chairman.

Chairman PERKINS. Thank you, Mr. Olver.

Mr. Chairman, let me just ask some more questions in terms of some of the activities of the ADA.

Currently, how many EEOC staff are involved in ADA-related activities such as promulgating regulations, coordinating efforts of the other agencies, and technical assistance ? And what impact is this having on the EEOC's overall responsibilities?

Mr. KEMP. Liz would probably be able to respond.

Ms. THORNTON. We currently, as the Chairman indicated, have an Americans with Disabilities Act Service.

Chairman PERKINS. I'm sorry?

Ms. THORNTON. We have an Americans with Disabilities Act Service.

Chairman PERKINS. Yes.

Ms. THORNTON. That service has a director. It will have two supervisors. There are two divisions—a Policy Division and a Technical Assistance Division. There will be four TA persons in the TA

Division—Technical Assistance Division—and three attorneys attached to the Policy Division.

In addition to that, there are people throughout the field offices who are responding to questions, who are answering questions, making speeches, and so on.

We have people in our Headquarters Office of Programs Operations (OPO) who are working on training as well as people in the Office of Legal Counsel working on training. There are a variety of different people throughout the agency who are performing a variety of functions.

Mr. KEMP. We have a Speakers Bureau, as I mentioned in my testimony, of 33. They have given 400 speeches around the country. Liz receives about 30 calls a day on ADA—a lot of them are just requesting that we send out the final rules and regulations. OCLA receives about 100 calls a day, asking for rules and regulations or asking very technical questions about workmens' compensation, medical insurance, and other things like that.

We don't really neatly put people in jobs in this area, and we've tried not to under other statutes. So it's hard to give you exactly how many employees we have working on ADA.

Chairman PERKINS. Okay, in terms of a rough estimate, could you maybe give us a shot at that?

Mr. KEMP. Liz?

Ms. THORNTON. It's kind of hard, as the Chairman said.

Chairman PERKINS. I won't hold you to it.

Ms. THORNTON. In our Office of Legal Counsel maybe there are 10 or 12 people. But then you've got to factor in all these other people throughout the agency who are working, so it's difficult to answer.

Chairman PERKINS. Let's discuss a little bit about the trust fund if it's set up.

What types of services are exactly going to be offered? Are you talking about seminars, are you talking about conferences? What type of services are going to be offered if this trust fund is in fact put in place?

Mr. KEMP. I think that one of the shocking things about the ADA is as soon as it was passed and signed into law, law firms started holding these seminars. Even on the literature that was sent to me to advertise the seminars there were mistakes. They did an awful lot of this before our rules and regulations came out. They terrified employers and they charged an arm and a leg.

I don't see why we couldn't have gotten involved in that training. I think we would have done a much better job for employers and charged about a third as much as the law firms charged.

Chairman PERKINS. Under this type of situation, would technical assistance be given on all laws enforced by the EEOC or is it just the ADA? Which one of these two is that under the trust fund?

Ms. BILLINGSLEY. It's all statutes.

Mr. KEMP. It would be all statutes.

Chairman PERKINS. All statutes?

Mr. KEMP. Yes.

Ms. BILLINGSLEY. That's right.

Chairman PERKINS. All right, so it's not just the ADA, then.

Mr. KEMP. And some are more complicated than others, too.

Chairman PERKINS. I understand.

Exactly how many EEOC employees will be used for developing this institute?

Ms. BILLINGSLEY. We are envisioning about 10 employees as initial startup. Some of those employees will be dedicated full time, that is, particularly providing the training curriculum, developing it. Some of the employees, again, a small cadre of 10 people, because we can't afford to devote more staff resources, will be doing collateral functions that they're currently performing plus additional Revolving Fund activities.

Chairman PERKINS. Just in terms—so we can walk through an example—could you give us an example of how the EEOC will respond to allegations of Americans with Disabilities Act discrimination by employers?

Mr. KEMP. Similar to Congressman Andrews' hypothetical?

Chairman PERKINS. Yes.

Mr. KEMP. A person will come to one of our 50 offices around the country and file a charge with us that employers have discriminated in such and such a way.

I think one of the first things that we will probably have to determine is whether we have jurisdiction under the act, and that's making a determination whether the person is handicapped or not.

Under Title VII it's a fairly easy determination. Under the Rehabilitation Act of 1973, it was much more complicated.

Then we'll determine whether there's cause or not. If we do find cause, we'll try to conciliate with the employer. And if we don't, then we'll decide whether to sue.

The ADA will be more complicated to enforce, and let me explain. It's very similar to bona fide occupational qualifications that have caused us an awful lot of trouble under Title VII. We really don't have any problems until we have made that exception. We look at whether a person is covered by Title VII, and see if we should have an exception.

Remember, Title VII says that certain characteristics are irrelevant, like sex, color, age—not age—but religion, et cetera.

Under a bona fide occupational qualification, we're saying that they are relevant. Under ADA, the characteristic that brings you into coverage under ADA is a critical factor.

So I think that this is going to be a much more complicated act to investigate.

We've estimated that our investigators will be able to handle roughly about 10 percent less—have 10 percent less closures when they get a mix of Americans with Disabilities Act cases.

Chairman PERKINS. Ten percent less?

Mr. KEMP. Yes, we'll be able to—so we'll knock it down from about 88 to about 80.

Chairman PERKINS. Assuming the fund, whatever.

Mr. KEMP. Yes.

Chairman PERKINS. One of the things I'm interested in and concerned about is a Harris Poll that said only 18 percent of the American public that was even aware there was such a thing as this act.

And particularly in going to areas—urban areas, high poverty areas, very rural areas—I know you've mentioned some of the sem-

inars that you're going to have around the country. But particularly in areas that—and segments of our population that perhaps would not be impacted so much by those types of approaches—do you have any additional way of trying to go into those areas and letting people know that this act actually exists and what their rights are, and what the remedies are?

Mr. KEMP. Yes, I was surprised it was as high as 18 percent, and I thought that was a very good indication.

I'd be curious to know about how many people—older people over 40—know that there's an Age Act in existence.

I think it's a very difficult problem to get the word out to employers. The work force and employers have radically changed in 25 years. There was a study done in 1987 that said the Fortune 500 companies would have 10 percent less employees in 1997 than they had in 1987; and if anything, they're going to have even less than that. Something between 80 and 90 percent of new jobs are going to be created by employers with less than 50 employees.

These are very small operations and they don't have the money to go to big three-day conferences—they don't have the money or the time. They're out making a product. These people will be creating the jobs and I don't know if we're getting the word to them.

Chairman PERKINS. Thank you, Mr. Chairman.

Let me ask you just a little bit. I certainly would encourage you to look at some additional areas in terms of ways to try to impact these groups because I don't think that what we're talking about is probably sufficient at this stage to make any kind of impact upon some of these areas that I think are really going to be vitally important.

If you could maybe look at some of the alternatives that are available to you and maybe submit them to us a little bit later, we'd certainly appreciate it.

Mr. KEMP. We have really been giving this a lot of consideration. We really haven't come up with some way to reach those small employers that are covered by ADA that really don't have the money to go to these big training sessions. And I think even more important is the time to go.

One idea is to have cassettes that employers could listen to on the way to and from work.

Chairman PERKINS. It relates back to the same thing we're talking about, the Manual, in terms of trying to get the Manual out to a lot of these individuals and these employers that are out there so they have something they can base some sort of decisions on.

Mr. KEMP. I don't know if this Manual, which will be bigger than the manual that you have up there—what about a small employer who's hiring 30 people, covered by ADA? He's making a complex product. He's under a whole lot of other Federal regulations—is he going to really have time?

Chairman PERKINS. Are you going to provide some sort of condensed manual or book that could go out to a lot of these employers that perhaps they would utilize?

Mr. KEMP. Yes, we've tried that. We have a little booklet for employers and for disabled people. IRS is sending out a notice that will tell when the ADA becomes effective; and it has telephone numbers for people to call.

The work force is changing, and I think that we've got to figure out some way. We haven't thought of any way to reach those people.

Chairman PERKINS. Again, I would encourage you to keep looking at this.

Mr. KEMP. We're trying our best.

Chairman PERKINS. I know it's a difficult thing but we certainly want to see the population served.

Let me ask you a question about the maritime industry that I've been asked by several people.

Mr. KEMP. The maritime industry?

Chairman PERKINS. Yes.

In terms of its responsibility under Maritime Admiralty law to provide a seaworthy vessel and personnel, are you doing anything with the U.S. Coast Guard to provide guidance to the industry and how to comply with Coast Guard regulations and the ADA?

Mr. KEMP. I never knew there was a problem.

Chairman PERKINS. Well, maybe I'll submit some questions to you later in writing, so that you'd give a little guidance.

I have been questioned to get some information on this and I would certainly appreciate that.

Mr. KEMP. I do think that cruise ships and other boats like that should be accessible to disabled people, and I think they're becoming accessible.

Chairman PERKINS. Do you plan to use any testers in ADA enforcement, that is, people who go out and work under cover, so to speak, so they can apply for jobs, who tests to see whether the employers discriminate?

Mr. KEMP. Let me go into this in detail because I think there's a lot of misunderstanding on the testers policy.

When I became Chairman about 18 months ago, I instructed General Counsel and Legal Counsel to look into whether it was legal to use testers under Title VII. I couldn't see why it could be used in housing and not under employment.

They came out in November of 1990 and said that there was no legal reason why we couldn't accept charges from testers. I never felt that EEOC's personnel shouldn't be involved in testing. Three reasons for that:

Number one, we are overloaded anyway. We're closing 88 cases per investigator. I think I'd be derelict to encourage more people to file.

Number two, in considering the nature of the 1964 Civil Rights Act, which has a conciliation aspect to it, I thought that would send a bad signal to employers—that we would be coming as testers 1 minute and then after we found a charge, we would try to come in and conciliate the charges with them.

The third reason is that I'm very sensitive personally on the whole concept of entrapment and think it's not a good policy.

Chairman PERKINS. Thank you very much.

Mr. OLVER. Mr. Chairman?

Chairman PERKINS. Mr. Olver?

Mr. OLVER. Might I claim back some of my time now that I've listened to a bit of this?

Chairman PERKINS. Please do.

Mr. OLVER. Thank you. I apologize if what I will ask will seem to cover or, indeed, closely cover what someone else may have covered already.

I would like to just explore for a minute your field of employers that you're working with you identify as the 666,000, I guess, from the testimony of employers?

Does that include all employers or is there a size? What's the size criterion?

Mr. KEMP. In 1992, on July 26, it will cover employers with 25 or more employees. And 2 years later, on July 26, 1994, it will cover employers with 15 or more employees; which is what Title VII now covers.

Mr. OLVER. So on July 1, 1994, it will cover everyone with 15 employees or more. Is that what the 666,000 represents in the 1994 window?

Mr. KEMP. Yes.

Mr. OLVER. How many employers are there with 25 or more, what would be your estimate on that?

Mr. KEMP. We cover only 15 percent of the employers in the country.

Mr. OLVER. That many of the total number of employers are much smaller?

Mr. KEMP. Yes.

By covering 15 percent of the employers, we do cover employers that have about 85 percent of the employees in the country. So we've got a lot of small employers.

Mr. OLVER. Now when you speak of, in the same sentence that I finally picked up the number of employers that are covered, the 43 million individuals with disabilities; is that individuals with disabilities of all ages or just in the employment years?

Mr. KEMP. All ages.

Mr. OLVER. Of all ages.

What would be the number in the employment years, what I might define as 18, or we might say 22, to 62 or 65, or something like that, or 70? Can you give me a sense of what that——

Mr. KEMP. No, because there can't be a cap. Employers can't require somebody to retire at a certain age. We did have definite figures when it was 18 to 62 or 65.

Mr. OLVER. However, there is a fairly high degree of retirement by some—there has to be an age where the employment percentage drops off, certainly, as one gets to higher ages, and there must be——

Well, there must be some way of defining what the number of employees—employables—are in the marketplace.

Mr. KEMP. Yes, but because they retire at a certain age doesn't mean that they leave the workplace. Toffler and Nesbitt said that people would have three or four very different careers during their lifetime.

Disability is a very difficult term to define.

Mr. OLVER. That was the next question I was going to ask. I mean, 43 million out of the whole population, I guess I would like to know what—I'm looking for background, I'm new at this. And I would like to know what the field of 43 million really looks like, what those disabilities are in broad form, certainly. But at the

same time that I'm asking the question of how many of those are in the employable ages. Because clearly we know that we could define as those up to age 12 probably are not part of an employable field and then there is an ever-greater employment capability, or need, between there and the time that one gets, say, through college. Then you've got college years to a point where people really feel that it's time to slack off somewhat.

What I'm trying to do is to get a handle on the field of employable people with disabilities and what the kinds of disabilities are that we're dealing with.

Mr. KEMP. Basically let me explain how we reached that figure of 43 million. I used to teach a course on disabled people and the law at Catholic Law School, and I spent about 6 hours trying to define "disability" with my class. If I were teaching a course in women and the law, I would spend about 30 seconds; Hispanics and the law maybe a minute and a half.

Disability is really made up of three components when you're defining it—it's loss of function. The other thing that it's made up of is education—how much education you have. If you are missing an arm and have a third grade education, you're probably really quite disabled. And if you're missing an arm and are a Harvard Law School graduate, number one in your class, it wouldn't really affect you probably at all and you might not even consider yourself disabled.

Mr. OLVER. Are you suggesting that your 43 million, then, includes those who are economically disadvantaged or educationally disadvantaged and just didn't have the floor opportunities of an education system?

Mr. KEMP. With a functional limitation. As a matter of fact, the hypothetical that I gave you is a friend of mine.

Mr. OLVER. With a functional limitation. With a physical or mental disability that goes with the educational disability?

Mr. KEMP. Yes, if a person has a mental or emotional disability, he's covered.

Mr. OLVER. Is the Americans with Disabilities Act—I'm sorry not really knowing what's in this act, if you will forgive me.

Does the Americans with Disabilities Act carry as a primary population those with educational disability or only if there's a physical or mental disability?

Mr. KEMP. Education does play into it. That's why I was trying to explain why it's difficult to define this term. It's made up of functional loss—education. If you lost your arm tomorrow—hypothetically—you could still serve in Congress, you could still be a lawyer. But if you had a third grade education and you lost your arm, you'd have difficulty getting a job because you'd have to be shoveling coal or something like that.

Do you see the problem?

Mr. OLVER. I fully expected that there was a problem—the number was so large that it has to carry a great number of crossovers.

Mr. KEMP. No, no. I think that basically about 15 to 16 percent of a population is disabled. Just take the total population of this country and multiply by 15 to 16 percent, and you get a rough figure.

Also, if you take the population of China, take 15 or 16 percent, it's roughly the disabled population there.

One of the things that's interesting about individuals with disabilities is that we are a special interest group that wants to lose our status as a special interest group. There are people I know today who are epileptics who don't feel that they are disabled people today because they have not been discriminated against. Twenty-five years ago, epileptics were one of the most discriminated groups in our society.

I think that a former colleague of yours, Tony Coehlo, should be given a lot of credit.

It's a very slippery term. This was 6 hours that I was discussing this with law school graduates trying to find a definition and couldn't do it.

But one of the things is that it's a hidden population. One of the things that I found very pleasing in the last couple of years is that I see a lot of people on the streets in wheelchairs, who are blind or deaf, and I don't know those people.

I've been in this movement for about 25 years, and up until about 2 years ago, if I were in an airport in Denver, Albuquerque, or Seattle, and I saw a blind person or a deaf person or a person in a wheelchair, I knew that person; now I don't know them. There are 43 million.

Mr. OLVER. I'm not doubting the number. I would like to have some sense of what the magnitude or degree, or combinations of complex disabilities that go on, and what—I mean, some of the 43 million probably have either a small degree of disability and some probably have a rather severe and complicated degree of disability.

Mr. KEMP. You have a third aspect of it that even complicates it further, and that is a person's image of himself or herself. If he has a very high self-image, he might be severely disabled in everybody else's eyes but function very well in our society. Other people with a very poor self-image who have a seemingly slight disability are in reality much more disabled.

Mr. OLVER. Maybe you can educate me in a different format than what we're doing here. And let me go on because I don't want to take up a lot of time on that point right now.

To go back to the employers, you have 666,000. I notice that you've got a plan. Has money been appropriated for the plan to reach out to six to 10,000 employers in a seminar program on the obligations of employers under the ADA?

Mr. KEMP. We're going to train about 400 people and have each one of those people——

Mr. OLVER. Let's talk about the employers first. The 400 people are individuals who are disabled people?

Mr. KEMP. Yes, but they're going to be obligated to train employers in their obligations under the law.

Mr. OLVER. Oh, your intent is to do the individuals before you do the employers?

Mr. KEMP. No, this is just another way of reaching the employers.

Mr. OLVER. Let's talk about the employers. The plan in your testimony is to do six to 10,000 employers in a series of seminars which look as if they are intended to have about 1,000 people per

seminar on what the obligations under the ADA would be for those employers.

Is the money appropriated already for that program?

Mr. KEMP. We have a budget of $210 million and we've scraped money together to implement that program.

Mr. OLVER. I see, so that the money is there to implement that program?

Mr. KEMP. Yes.

Mr. OLVER. Is then the Handbook that is described—which I take it is meant to—because that's only reaching 1 percent of those employers who are part of the field—is the Handbook then intended to be drafted as a result of the workshop experience with employers about——

Mr. KEMP. No, we're in the process of doing the Technical Assistance Manual right now. It has to be published by January 26, 1992.

Mr. OLVER. The Handbook?

Mr. KEMP. Yes.

Mr. OLVER. And that will be prior then to having the workshops. So the preparation of the Handbook, is that being done with core groups or focus groups on how to get this information across to employers?

Mr. KEMP. We've met with employers, we've met with disability groups, and we've met with others, devising the best possible way to get this information across.

Mr. OLVER. Is there an intent to use, then, some of the six to 10,000 employers in the way that I think I detect you're intending to use the individuals who are trained in the complementary individual training program, to use those employers to get information to larger groups of employers since, again, employers are 20 percent?

Mr. KEMP. We would like to use them, but they're basically running their businesses and not educating their competitors about how to comply with the ADA.

I do think that most of the things that we have devised for reaching employers are reaching the big employers—the ones that have legal counsel and that have special personnel offices that handle these things.

We really haven't come up with a way to reach the sm[illegible] employers.

Mr. OLVER. I certainly wish you well on reaching 1,000 p[illegible]e in a workshop at one time. The workshop seminars for 1,000 people are, I think, an ambitious undertaking, at the very least.

But on the individual, let me go over to the individual program for a moment. You have a plan to reach, I think it was 400 individuals. These individuals are individuals with handicaps who are covered under the ADA Act; is that correct?

Mr. KEMP. Yes.

Mr. OLVER. And they are not intended ultimately to be employees of the Commission; is that correct?

Mr. KEMP. They won't be employees of the Commission.

Mr. OLVER. They won't be.

So you're training them as advocates, in essence, who supposedly will become well informed of——

Mr. KEMP. There are roughly 5,000 disability groups around the country. These are people that are probably working for these various groups that will come and learn about Title I of the ADA and then have an obligation to train a certain number of other people and train a certain number of employers.

Mr. OLVER. And that, again, comes out of the budget that you already have, so that's all allocated and ready to go. That's also going to go forward in 1992?

Mr. KEMP. Yes.

Mr. OLVER. Will the individuals that get trained, the 400, you then have indicated you then want to reach each one, hopefully, an average of 50 other people; are they going to get assistance in that kind of training, this sort of second training, down the line to the next 50?

Mr. KEMP. I really don't know. I think we are going to take of the 400—we're going to take 100 of the best and have them train a certain number of employers.

Mr. OLVER. I see.

Just lastly, are there large sections exempted from the ADA? Is government, either State, municipal government, or the Federal Government, in any way exempted from the provisions of the ADA?

Mr. KEMP. No. Congress is covered, too.

Mr. OLVER. Pardon?

Mr. KEMP. Congress is covered.

Mr. OLVER. Congress is even covered; isn't that wonderful?

Thank you, Mr. Chairman, I'm done.

Chairman PERKINS. Thank you, Mr. Olver.

With unanimous consent, the subcommittee will be submitting some additional questions for the Chairman. I think Mr. Gunderson may have, and we will probably have some as well, under written form, and we'd appreciate your trying to respond to them when you can.

[Questions and answers are included at the end of the hearing record.]

Chairman PERKINS. I would like to take this opportunity to again thank Chairman Kemp for his indulgence in coming down to see us today. We all want to work together to see that ADA is implemented in the best possible fashion that we possibly can.

With that, I would like to say, we might just as well adjourn this one today, and thank you all for coming.

Mr. KEMP. Thank you very much.

Mr. ANDREWS. Thank you.

Mr. KEMP. Thank you, Mr. Andrews.

[Whereupon, at 11:45 a.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows.]

COUNTY OF GLOUCESTER
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MARGARET M. SMITH
FREEHOLDER
LIAISON BOARD OF THE COUNTY
OF GLOUCESTER NOT TO DIS-
CRIMINATE AGAINST QUALIFIED
HANDICAPPED INDIVIDUALS IN
THE EMPLOYMENT OR PROVISION
OF SERVICES

JACQUELYN M. LOVE
DIRECTOR
PERSONAL ATTENDANT
SERVICES PROGRAM
ADMINISTRATOR
SERVICES INCLUDE COUNSELING
FOR BLIND/VISUALLY IMPAIRED

October 29, 1991

Congressman Robert Andrews
16 Somerdale Square
Somerdale, NJ 08083

RE: Americans with Disabilities Act 1990

Rob

Dear Congressman Andrews:

As a result of your call to our Office, we began a survey to enable us to give you the latest and accurate information. The general perspective reflects ADA has done a lot towards raising the consciousness to issues surrounding persons with disabilities but several state it is too vague and lacks enforcement features. With the Lou Harris Poll stating 66% of the disabled are unemployed and 67% of this number want to be gainfully employed, the ability to implement ADA will be molded by court actions.

In New Jersey, advocates like our local advisory commission, are needed to play a vital role in helping employers and the general public at large to understand what real assistance really entails. Ask the person with a disability how to address their needs. This makes much more sense than starting costly building plans without their input.

Many are taking a wait and see approach, while many more are taking action by reaching out to employers and businesses offering assistance today. The latter approach is by far the best. Don't be afraid to come together, the time is now.

ADA Congressman Andrews
page 2

Please read on for other advocates who were so kind to give us their viewpoints.

Sincerely,

Jackie

Jacquelyn M. Love
Director

JML/kd
CC: Margaret M. Smith, Freeholder
Attachments

Faxed and Mailed

SURVEY ON ADA

A Comment from a New Jersey Transit Advocate:

Implementation was a good thing. N.J. Transit, however, had started to do many of the items in the ADA before it became law. The selection of key rail stations was dispersed evenly between all stations by the ADA. This part of the plan is almost complete. Public hearings will be held in the springtime.

Paratransit - Presently N.J. Transit is developing an ADA Paratransit plan that must be submitted by January 26, 1992. Preceding this submission Public Hearings will be held. During the development of both plans N.J. Transit is actively seeking input from individuals with disabilities across the State.

It has been the policy of N.J. Transit to purchase accessible buses before ADA.

Lacking - Paratransit eligibility criteria is too vague. The intent of the ADA was to make the eligibility criteria narrow, however they left too many questions unanswered. Nothing is concrete on how "disabled one must be".

A County Advisory Commission Advocate:

ADA has no guidelines, therefore, it is only good while there is attention paid to it. It lacks teeth.

Until the law is totally in effect, all regulations and guidelines will have a gradual impact on Section 504.

Survey/cont.

Southern N.J. Tri-County Advocate:

It is good that the ADA is here and available.

PATCO is doing a very good job adhering to regulations.

Lacking in enforcement procedures. Regulations are too loose.

It needs a format to bring disabled people together to start a grassroots watchdog group.

A Northern N.J. County Advocate:

Their area is working with her through the Community College on workshops on the ADA.

This Advocate is also working on individual assessments for municipalities on the ADA.

Their opinion on the ADA is that its real position is going to be taken up in the courts. The good of ADA-bottom line is consciousness raising at best, but its actual implementation may be difficult.

Evaluation tools for compliance are lacking. Checklists for all aspects of ADA are needed.

A Central N.J. County Advocate:

The passage of the ADA will bring attention to the needs of the disabled.

Another Office For the Disabled is already working with outside businesses on accessibility standards. They are already working with trying to have the business community accept employment of the Handicapped without discrimination.

The results of the implementation of the ADA are questionable. Court cases could become prevelant.

Survey/cont.

A N.J. Agency Head:

It was good to implement the ADA. It brought attention to the disabled community. There is a lot of potential for good to come out of this.

Lacking - Enforcement through funding seems to lacking.

The Agency Head feels that members of Congress (House and Senate) should be under the same rules and laws as everyone else. He states that Congress is exempt not only from the ADA, but the Section 504 rulings.

A N.J. Department Advocate:

This Advocate felt that the ADA gives everyone the same opportunity. Accessibility and/or accommodation should be for everyone.

He also felt that cost will be the big factor. The costs of retrofitting with no provisions for either tax credits or other incentives for the business and governmental community could be a big stumbling block.

A. Southern N.J. County Advocate:

Was good to implement ADA. Brought attention to persons with disabilities.

Will implement laws to accomodate the disabled which will bring the disabled into the work force which would have heretofore been unavailable to them.

Law seems to be overwhelming. Difficult to implement without specific guidelines.

- 3 -

:jmh

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

November 21, 1991

The Honorable Carl C. Perkins
Chairman
Subcommittee on Employment Opportunities
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Perkins:

Pursuant to your November 4, 1991 request, I am submitting the Equal Employment Opportunity Commission's responses to the Subcommittee's questions in follow-up to the October 30, 1991 hearing on EEOC's implementation of the Americans with Disabilities Act.

Please let me know if you need any additional information.

Sincerely,

Ronnie Blumenthal

Ronnie Blumenthal
Acting Director of Communications
and Legislative Affairs

Enclosure

OVERSIGHT HEARING ON EEOC'S IMPLEMENTATION OF THE ADA
ADDITIONAL QUESTIONS TO EEOC

1. Regulation Addressing "Direct Threat"

The ADA permits the employer to establish a qualification standard that will exclude individuals who pose a "direct threat" to the health or safety of other individuals in the workplace. EEOC, in the Title I regulations, goes beyond the statutory language by adding the "individual" within the definition. What is EEOC's rationale for including this provision and what will the Commission do to prevent employers from improperly using the standard? Please provide an example where this standard might apply and an example where it would not apply.

The EEOC believes that the direct threat to self standard set forth in its final regulations is necessary to ensure that employers do not exclude individuals with disabilities from employment opportunities because of myths and fears about safety. The ADA does not itself exclude the employer defense of direct threat to self. Nor does it preclude either the Commission or the courts from establishing such a defense. To the contrary, the report of the House Committee on Education and Labor states that an employer would not be required to hire an individual where the entrance examination revealed a medical condition sufficient to demonstrate a "high probability of substantial harm if the candidate performed the particular functions of the job in question." (H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 73 (1990)).

Moreover, the courts interpreting section 504 of the Rehabilitation Act have read into it the concept of direct threat to self. In doing so, however, the courts have utilized various standards, many of which have permitted the consideration of generalizations about the effect or progress of a disability or about the anticipated future ability of the individual to perform the job -- criteria that cannot be considered under the stringent direct threat to self provision in the Commission's regulations.

The Commission could have chosen to remain silent about direct threat to self, but we decided instead to set forth a direct threat to self standard as stringent as the direct threat to others standard in the statute, and thereby foreclose the possibility of the future development of varying direct threat to self standards. Under the Commission's direct threat standard, the employer must show that the individual poses a significant risk of substantial harm. The determination that an individual poses a direct threat to self can only be based on the individualized assessment of objective, factual, medical, and other evidence relevant to the functions of the job. The opinion of the employer and/or speculation about the individual's future ability to perform the job are irrelevant.

The following examples show situations where the direct threat to self standard would -- and would not -- apply to exclude individuals with disabilities:

(1) The standard would exclude from a job as a roofer (working on the tops of houses installing, repairing, or replacing roofs) a person who has a seizure disorder, where his periodic seizures cause him to lose consciousness and are not controlled by medication.

(2) The direct threat standard would not exclude such a person from the roofer job if his seizures were controlled by medicine, or if he had been seizure -free for several years.

2. Interpretive Guidelines

The Interpretive Guidelines, which are an Appendix to the final EEOC regulations to Title I of the ADA, have been described as being as important to employers and disability advocates as the rule itself. How is EEOC planning to assure that the guidelines are included wherever the regulations are found, for example, in the Code of Federal Regulations, the EEOC ADA Manual or other EEOC ADA materials?

The Interpretive Guidance is an Appendix to the Commission's final regulations and will be included wherever the final regulations appear. Thus, for example, the Guidance, which already appears with the regulations in the Americans with Disabilities Act Handbook, will also be included in the Technical Assistance Manual to be issued by the EEOC in January 1992, and in the Code of Federal Regulations.

3. **EEOC Employees with Disabilities**

What percentage of the investigative staff at the district level have disabilities? What percentage are minorities?

EEO Statistics of EEOC's Total Investigative Staff - as of September 30, 1991

	Number	Percentage
Total	1177	100.0
Individuals w/ Disabilities	160	13.6
White	402	34.2
Black	582	49.4
Hispanic	156	13.3
Asian Am/Pac Isl	17	1.4
Am Indian/Alsk Nat	7	0.6
Female	644	54.7

* Missing 13 (1.1%) Pending Identification

EEO Statistics of EEOC's Headquarters Investigative Staff - as of September 30, 1991

	Number	Percentage
Total	27	100.0
Individuals w/ Disabilities	6	22.2
White	13	48.1
Black	12	44.4
Hispanic	1	3.7
Asian Am/Pac Isl	1	3.7
Am Indian/Alsk Nat	0	0.0
Female	15	55.5

3

EEO Statistics of EEOC's Field Investigative Staff - as of September 30, 1991

	Number	Percentage
Total	1150	100.0
Individuals w/ Disabilities	154	13.4
White	389	33.8
Black	570	49.6
Hispanic	155	13.8
Asian Am/Pac Isl	16	1.4
Am Indian/Alsk Nat	7	0.6
Female	629	54.7

* Missing 13 (1.1%) Pending Identification

4. "Testers"

Does the EEOC plan to use testers in ADA enforcement?

The EEOC is in the process of devising guidance procedures for organizations that wish to send testers into the work place to test for employment discrimination. These guidelines will encompass ADA issues.

5. ADA Tax Credit

What are the plans to educate employers about the availability of the ADA tax credit enacted by the Congress last year? It is our understanding that section 190, (a deduction for removing physical barriers) has existed since 1982 but it has not been utilized. Given this history, how do you plan to educate employers and others about this deduction and the new tax credit?

The Commission has developed a Fact Sheet entitled "Disability-Related Tax Provisions Applicable to Businesses." (Attached) The Fact Sheet summarizes the three disability-related provisions of the Internal Revenue Code applicable to businesses: 1) Targeted Jobs Tax Credit (Title 26, Internal Revenue Code, section 51); 2) Tax Deduction to Remove Architectural and Transportation Barriers to People with Disabilities and Elderly Individuals (Title 26, Internal Revenue Code, section 190); and 3)

BEST COPY AVAILABLE

Disabled Access Tax Credit (Title 26, Internal Revenue Code, section 44). The Fact Sheet is included with all telephone and correspondence requests to the Commission for information regarding the ADA.

The jointly-developed EEOC and Department of Justice ADA Handbook contains the same summary of the three disability-related provisions described in the Fact Sheet. The ADA Technical Assistance Manual will include this same material, as well as the actual filing forms required by the Internal Revenue Service.

The EEOC booklet The Americans with Disabilities Act: Your Responsibilities as an Employer and the joint EEOC and Department of Justice booklet The Americans with Disabilities Act: Questions and Answers include information on the availability of the section 190 tax deduction and section 44 tax credit provisions.

As indicated in Chairman Kemp's October 30 testimony before the Subcommittee, EEOC will insert in the IRS quarterly mailing to approximately 5.9 million businesses a notice stating the general provisions and effective dates for the ADA. It is anticipated that the availability of the tax provisions will be included in the insert.

Finally, the availability of the disability-related tax deductions and tax credit is contained in the model script used by EEOC staff participating in the Commission's ADA Speakers' Bureau. Since its inception in July 1990, the Speakers Bureau has provided more than 400 presentations to organizations such as employer groups, disability groups, Federal agencies, hospitals, bar associations, universities and human resource organizations.

6. Coordination

How does EEOC intend to work with disability related Federal agencies such as the Rehabilitation Services Administration, the Administration on Developmental Disabilities, the Department of Justice and the Department of Labor?

Beginning in January 1991, the Commission initiated weekly coordination meetings of Federal agencies with enforcement responsibilities under Titles I and III of the ADA or with experience with advocacy for or the provision of services to individuals with disabilities. In addition to the Commission, participants in these meetings represented the Rehabilitation Services Administration and the National Institute on Disability and Rehabilitation Research of the U.S. Department of Education, the Civil Rights Division of the U.S. Department of Justice, and the President's Committee on Employment of People with Disabilities. The Administration on Developmental Disabilities joined the meetings beginning in June 1991. When the group meets

again on November 21, participants will include the U.S. Department of Transportation, the Federal Communications Commission, the National Council on Disability, the Office of Federal Contract Compliance Programs of the U.S. Department of Labor, and the Architectural and Transportation Barriers Compliance Board. While the EEOC will continue as the host agency, the Department of Justice, in its role as coordinator for Federal technical assistance efforts, will chair the meetings.

Significant cooperative efforts have been conducted as a result of this series of meetings to date. The Department of Justice and EEOC, supplemented by funding from the National Institute on Disability and Rehabilitation Research, jointly developed the booklet The Americans with Disabilities Act: Questions and Answers and the ADA Handbook. The Department of Justice and EEOC have collaborated on a distribution strategy for the ADA Handbook to assure its availability to public and specialty libraries, legal and advocacy organizations, disability rights organizations, and groups representing business and industry.

On October 30 and 31, a meeting was held in the Washington, D.C. area for all grantees, contractors and subcontractors funded by Federal agencies for the purpose of providing technical assistance on the ADA. Included in the meeting were representatives of: 1) Regional Disability and Business Accommodation Centers, Materials Development Projects, and National Training Projects funded by the National Institute on Disability and Rehabilitation Research; 2) Technical Assistance Programs funded by the Civil Rights Division of the Department of Justice; 3) Short Term Training Project for Rehabilitation and Independent Living Personnel funded by the Rehabilitation Services Administration; and 4) the National Training Program for Individuals with Disabilities funded by the Equal Employment Opportunity Commission. In total, 31 federally-funded ADA technical assistance projects were represented. EEOC and Department of Justice staff provided detailed presentations on the provisions of the final regulations for Titles I, II and III of the ADA, as well as information on the availability of technical assistance materials from both agencies.

As required by the Act, EEOC and the Office of Federal Contract Compliance Programs of the U.S. Department of Labor promulgated coordination regulations to set forth procedures governing the processing of complaints that fall within the overlapping jurisdiction of Title I of the ADA and Section 503 of the Rehabilitation Act of 1973, as amended. In addition to this proposed regulation, issued in the form of a memorandum of understanding (MOU), EEOC will participate in training of OFCCP staff and provide ample supplies of technical assistance materials regarding the employment provisions of the ADA. The EEOC-developed poster, advising applicants and employees of their right to protection from employment discrimination, will include information

on the laws enforced by OFCCP. The Commission anticipates distributing approximately 500,000 copies of the new poster in calendar-year 1992.

Similar coordination regulations and activities between the Commission and the Department of Justice will address potential enforcement conflicts between the ADA and Section 504 of the Rehabilitation Act.

All of the Federal agencies participating in the coordination meetings have assisted or provided input in the distribution of EEOC and Department of Justice ADA technical assistance materials. The Commission also has reviewed and provided comment on technical assistance materials developed by these agencies.

7. Accessibility Issues

Some of the local caseloads will involve allegations of discrimination by people with disabilities who will need to have the case documents in an accessible format, such as braille or computer disc. Can you tell us how your offices are preparing to deal with these situations?

EEOC needs to make available in accessible format key documents such as the interpretive index and the compliance manual. Please explain the timetable for accomplishing this and also describe the distribution methods you will use to make sure that people with disabilities will have access to these documents.

Any forms which a charging party will be required to fill out him or herself, such as the Intake Questionnaire, will be available in accessible format, such as braille, or through the interpretation of a reader. Also, a charging party who is vision-impaired or severely dyslexic who requests access to his or her case file through the Freedom of Information Act or in order to file private suit will be provided with a reader, such as an investigator, who is capable of interpreting the file. Translating entire case files into braille would be unduly time consuming and expensive; moreover, many subtle aspects of documents which may be key to their importance as evidence cannot be conveyed by straight translation of the text, i.e. notes in the margin, charts which must be visualized to be understood, etc. In the Commission's experience, providing readers/translators for charging parties who do not speak English has proven to be the most effective method of interpretation.

EEOC's ADA Title I final regulations, including the interpretive appendix is available from the Commission in the standard alternative formats (i.e., braille, large print, electronic file on computer disk, and audio-tape) to make it accessible to persons with visual impairments.

7

The ADA Technical Assistance Manual, to be published in January 1992, will be available from the Commission in the aforementioned standard alternate formats.

The ADA Handbook, published jointly by the Department of Justice and EEOC, is available from the Department of Justice in the same standard alternate formats.

In addition to the ADA Technical Assistance Manual, the agency is also developing sections on the ADA for the EEOC Compliance Manual. The Compliance Manual is an internal document that instructs Commission investigators and lawyers on the law, policy interpretations and procedures to be used in processing charges under all of the statutes enforced by the Commission. The two large volumes are constantly evolving with equal employment law.

The Commission does not sell, lend, or send copies of the entire Manual to the public. The Manual is, however, available for review and use by the public at the Commission's headquarters library and all Commission field offices. Pursuant to section 504 of the Rehabilitation Act of 1973, as amended, and the Commission's implementing regulations (29 C.F.R. Part 1615), the Commission will make its Compliance Manual available to visually-impaired members of the public under the same restrictions that it imposes on the non-disabled public. When an individual with a visual impairment makes an appointment with the library to use the Compliance Manual (as non-disabled members of the public are required to do), he or she can request the services of a Commission-provided reader. The library also has various audio and magnification equipment and software, including a VTEK reader. In addition, an individual can request, in advance, or after visiting the library, that the needed portion or section of the Compliance Manual be made available in an accessible format, such as on audio-tape, to take from the library, just as a non-disabled person can photocopy sections of the Manual while at the library. At this time, the older sections of the Compliance Manual are not on computer disk, but those later sections that are on disk can be made available in that format or in braille. Requests for these formats are handled on a case-by-case basis. The Commission will make every effort to respond to such requests as quickly as possible.

The EEOC Compliance Manual is also published and sold by the Bureau of National Affairs (BNA), the Commerce Clearinghouse (CCH), and several other commercial publishing houses. They do not, however, contract with the Commission for its publication. The Commission will make one copy of the Compliance Manual available to any publisher who requests a copy for the purpose of publishing it. The publisher is not, however, under any contractual obligation to publish the Manual. The Commission is ready to make the Compliance Manual available to any entity, such as the National Library Service for the Blind of the Library of Congress, the American Printing House for the Blind or Recordings for the Blind, Inc.,

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that would like to publish the Compliance Manual in an accessible format. Further, the Commission is surveying various national organizations representing individuals who are blind or visually impaired to determine the potential market for the Manual in various alternate formats. This publication will be made available to publishers with experience in publishing the Manual, but with no prior history of accessible formats for publications.

8. Maritime Industry

Given the fact that the maritime industry is responsible under admiralty law to provide a seaworthy vessel in terms of equipment and personnel, how will the EEOC view current physical qualifying factors practiced within the industry in the context of ADA provisions?

Will the EEOC work with the U.S. Coast Guard, other involved federal agencies, and the industry to determine whether physical qualifying factors currently in use and relevant maritime statutes and regulations currently in effect are consistent with ADA provisions?

If it is discerned that inconsistencies exist between the ADA and current industry practice in determining fitness for duty, as required under existing maritime statutes and regulations, what course of action will be expected from the maritime industry and, when making its decision, what weight will the EEOC place on existing maritime laws and regulations? Will the ADA preempt existing relevant maritime statutes and regulations?

Like other transportation industries, the maritime industry has established certain physical and mental qualification standards for its employees (in the case of the maritime industry, able seamen and other crew members). The United States Coast Guard also has regulations and guidelines concerning the fitness of crew members.

Under the Commission's ADA regulations, where a federal law or regulation requires an employer to take a certain action that would conflict with the ADA, or prohibits an employer from taking a certain action that would otherwise be required by the ADA, the federal law or regulation can be used as a defense to an ADA charge of discrimination. Therefore, to the extent that the maritime industry applies a qualification standard required by the Coast Guard, it may continue to use that standard and will not be found to have violated the Title I implementing regulations.

The purpose of allowing the defense of conflicting federal laws under the Commission's Title I regulations is to ensure that employers are not caught in the middle of conflicting federal

requirements, and that any potential conflicts between the ADA and other federal laws or regulations are resolved directly between the federal agencies.

Pursuant to Executive Order 12067, all federal departments and agencies are required to advise and offer to consult with the Equal Employment Opportunity Commission (EEOC) regarding any proposed rules, regulations, policies, procedures, or orders concerning equal employment opportunity, except those issuances related to internal management and administration. Inasmuch as regulations pertaining to physical or mental qualifications required of crew members would affect the equal employment opportunities of individuals with disabilities in the maritime industry, such regulations and policies are to be submitted to the EEOC for review for consistency with the ADA. In addition, the EEOC may review existing federal regulations and initiate the coordination process where appropriate. The issuing agency will be requested to bring its regulations into compliance with the ADA standards if inconsistences exist. In this manner, employers will not be caught in an untenable position and individuals with disabilities will be assured broader access to employment.

In the event that state or local laws, regulations, or ordinances establish requirements for crew members of vessels operating within their jurisdiction, any conflict with the ADA will be resolved in favor of the ADA, a federal statute.

To the extent that the maritime industry has established its <u>own</u> physical or mental qualifications, such qualifications must be job-related and consistent with business necessity if they screen out or tend to screen out individuals with disabilities. Where safety is implicated, the employer must show that individuals with disabilities who do not meet the established qualifications pose a direct threat to the health or safety of themselves or others that cannot be eliminated or reduced to an acceptable level by reasonable accommodation. As indicated in our answer to question 1, the direct threat standard requires a showing that an individual with a disability would incur a significant risk of substantial harm if (s)he performed the job in question. It should be noted that this same direct threat standard will be applied to federal regulations during the interagency coordination process pursuant to Executive Order 12067.

Under the ADA, is physical agility testing considered a medical exam? Can physical agility testing be performed before the tentative job offer? Under the ADA, can one distinguish between the routine and dangerous employment conditions when determining an applicant's ability to perform physically strenuous tasks?

The Interpretive Guidance published as an Appendix to the Commission's final regulations specifically provides that

"[p]hysical agility tests are not medical tests and so may be given at any point in the application or employment process." 56 FR 35750. Thus, they can be administered before a conditional job offer is extended.

An applicant with a disability must be able to perform the essential functions of the position held or desired with or without reasonable accommodation. If the essential functions of the position require the individual to perform "physically strenuous tasks" in "dangerous" situations, an employer can establish and apply job-related qualifications that are necessary for the performance of such functions.

Under the ADA, can an employer ask an employee to explain/demonstrate how he would perform the job when returning after an injury?

For purposes of the ADA, "returning employees" are considered to be employees, not applicants. An employer is prohibited from making any medical inquiry as to whether an employee has a disability unless such inquiry is job-related and consistent with business necessity.

An employer may ask an employee, a "returning employee," or an applicant to describe or to demonstrate how s/he can perform job-related functions with or without reasonable accommodation. It should be noted, however, that the returning employee is qualified under the ADA if (s)he can perform the essential functions of the job with or without reasonable accommodation.

Is an inquiry into the history of an individual's worker's compensation claim a prohibited pre-employment inquiry? Is an inquiry into a candidate's worker's compensation history permissible when job related and consistent with business necessity?

Inquiries about an applicant's workers' compensation history are not permissible at the pre-offer stage inasmuch as such questions are likely to reveal medical information (i.e., their history of work-related injuries) that an employer could not inquire into directly. However, inquiry into a person's workers' compensation history may be made after a conditional offer of employment has been extended.

Inquiries at the post-offer stage do not have to be job-related and consistent with business necessity. However, if an offer of employment made to an individual with a disability is subsequently withdrawn because of a disability, the exclusionary selection criterion must be job-related and consistent with business necessity. If safety to self or others is implicated, an

employer may consider an applicant's history of numerous on-the-job injuries in determining whether, in doing the job in question, (s)he would pose a high probability of substantial harm that cannot be eliminated or reduced to an acceptable level by reasonable accommodation. The fact that a person has filed numerous workers' compensation claims on previous jobs does not, in and of itself, prove that there exists a high probability of substantial harm.

Under the ADA, if there are two identical applicants for a position and one has an ability to perform a marginal job function and the other is unable to perform this function, is the employer required to hire the disabled individual?

An employer may hire the "best qualified" applicant for a position. The ADA, however, prohibits an employer from denying a job to a qualified individual with a disability because of the disability. For this reason, an employer could not refuse to hire an individual who could perform the essential functions of a position because the individual's disability prevented him or her from performing a marginal function.

The EEOC regulations cite that it would be unlawful for an employer to reject an otherwise qualified applicant whose spouse has a disability because of the belief that the applicant would have to miss work frequently or leave work early to care for the spouse. Is it lawful in such a situation for the employer to ask the applicant if he/she would be required to miss work because of the spouse? If the applicant answers in the affirmative, is it then lawful to deny the applicant employment?

The ADA does not prohibit an employer from asking an applicant if (s)he would be required to miss work because of a spouse's disability. An employer could deny employment to such an applicant who indicated that (s)he could not meet an employer's established time and attendance policies. However, if the applicant indicated that (s)he could satisfy such policies or if the applicant indicated that (s)he would not miss any work because of a disabled spouse and was nonetheless denied the job, the employer's question might be probative of an intent to discriminate on the basis of the applicant's relation with a person with a disability.

The ADA requires that reasonable accommodations be made for the disabled. This namely applies to changes in the workplace, does it also apply to changes on vessels or towboats?

The duty to accommodate applies to any place of work used by a qualified individual with a disability. Vessels and towboats, therefore, might have to be modified to meet the accessibility needs of a particular employee, if that would not impose an undue

hardship. Clearly, vessels and towboats are very different work environments from offices, and this would be a relevant factor in determining undue hardship in at least two respects. First, an accommodation is not required if it would fundamentally alter or disrupt the employer's business or present significant difficulty. Second, an accommodation that imposes a significant expense on an employer in relation to the employer's available resources is also not required.

Does the EEOC plan to provide technical assistance to trade associations regulating the maritime industry?

The EEOC is providing specific technical assistance to the maritime industry through its review of an industry "Information Guide on the ADA". In January of 1992, the Commission will publish its Technical Assistance Manual which will be available to the maritime industry as well as to the general public. The Manual will be a major "how to" resource for employers, with guidance on reasonable accommodation as well as other aspects of compliance. The Manual will also include a directory of technical assistance resources.

9. General Health of EEOC/ADEA Claims

What actions are being taken by EEOC to ensure that age discrimination charges are processed in time, by both EEOC district offices and FEPAs, to meet the ADEA's two-year statute of limitations? Will it be necessary for Congress to pass an "ADCAA III" during the 102d Congress?

EEOC has taken many significant measures to prevent ADEA charges from lapsing the two-year statute of limitations:

* In FY 1988 EEOC field offices were instructed to resolve ADEA charges that were nearing the statute of limitations on a priority basis. EEOC was able to assign 128 additional investigators. Since then, EEOC has resolved more ADEA charges than it has received to process.

* Improvements to EEOC's computerized tracking systems began in 1986 and have been further developed and improved without additional appropriated funds. These systems have allowed the agency to establish tracking programs for past and current records and permit us to analyze and monitor enforcement activities nationwide.

* The improvements in computer systems provided EEOC the tools to develop a comprehensive case management system. A series of programs were developed to monitor the movement of charges by units

and office. Programs allow managers to track ADEA charges by date of alleged violation or by expiration date of the filing suit rights. On specific dates for ADEA charges, written notices are mailed to Charging Parties advising of their suit rights.

* EEOC has not had comprehensive training since 1987. However, in FY 1991 we spent $1.2 million to provide some initial training to EEOC staff: investigative staff in improved investigative techniques; field office directors and supervisors in supervisory responsibilities and implementation of the charge management programs; computer and data operators on ways to better utilize agency computers to assist office management. Headquarters management staff also developed a series of routine reports to enhance the monitoring of charges and some training videos to provide ongoing on-the-job training to the staff.

* EEOC took action to prevent the inadvertent lapsing of the federal statute of limitations of charges being processed by FEPAs.

* In April 1988 field offices were instructed to immediately implement a system to monitor charges processed by FEPAs.

* EEOC District Directors were instructed to contact the FEPAs within their jurisdictions to ensure that age charges were handled on a priority basis.

* The FEPAs were asked in April 1989 to reconcile their local data bases with a National Data Base printout of lapsed age charges in the FEPAs.

* On July 6, 1990 the field offices were told to identify every age charge in an FEPA's inventory that had aged 15 months from the date of violation and "to assume jurisdiction over each FEPA age charge which is still open in an FEPA's inventory after 16 months." FEPAs would not receive contract credit for charges still open after 16 months.

* For FY 1992 the field offices are being instructed to "assume jurisdiction over each FEPA age charge which is still open after 14 months from the date of the earliest alleged violation." This authority is being written into the worksharing agreements for FY 1992.

* Until fiscal year 1991, District Directors were held accountable for lapsed ADEA charges in their own office's inventory. But in the FY 1991 mid-year performance reviews, Field Management underscored these Directors' responsibility for ADEA charges lapsing in their FEPAs' inventory.

* EEOC is working to implement a uniform case management system in the FEPAs which should help them track and monitor age charges. In FY 1992, the Commission will adapt the case management training for EEOC supervisors to the needs of FEPA enforcement managers.

* EEOC has established a State and Local Division in the proposed Charge Resolution and Review Program that will allow more centralized EEOC influence over the FEPA operation and allow additional review of the quality of FEPAs' charge resolutions.

Recent passage of the Civil Rights Act of 1991 which eliminates the two-year statute of limitations under the ADEA, together with the measures EEOC has taken to gain greater control over its workload preclude the necessity for additional ADCAA legislation.

10. Statistics

How many individuals 18 to 64 years old have disabilities?

Of the noninstitutionalized U.S. population over 15 years old, an estimated 7.5 percent (13.5 million people) are severely limited in the functions of seeing, hearing, speaking, lifting or carrying, walking, using stairs, getting around inside or outside, or getting into and out of bed.

Of the 13.3 million people with a work disability (8.6 percent of the working age population -- 16 to 64 years old), 33.6 percent are in the labor force and 15.6 percent are unemployed. These values are very different from those of the population with no disability (140.0 million) which has a labor force participation rate of 78.5 percent, and an unemployment rate of 6.8 percent. Only 19.7 percent of the people with a work disability are employed full-time. In comparison, 59.4 percent of people without a work disability are employed full-time. (1987) Source: Chartbook on Disability in the United States, National Institute on Disability and Rehabilitation Research, U.S. Department of Education, 1989.

It is important to keep in mind that the definition of disability used by governmental entities for the purpose of collecting population statistics may not be immediately comparable to the definition of disability applicable to the ADA. In passing the ADA, Congress adopted the definition of disability from the Rehabilitation Act definition of the term "individual with handicaps." By so doing, Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term "disability" as used in the ADA.

The definition of the term "disability" is divided into three parts. An individual must satisfy at least one of these parts in order to be considered an individual with a disability for purposes

of the ADA. An individual is considered to have a "disability" if that individual either (1) has a physical or mental impairment which substantially limits one or more of that person's major life activities, (2) has a record of such an impairment, or, (3) is regarded by the covered entity as having such an impairment.

To understand the meaning of the term "disability," it is necessary to understand, as a preliminary matter, what is meant by the terms "physical or mental impairment," "major life activity," and "substantially limits."

Physical or mental impairment in the ADA adopts the definition of the term "physical or mental impairment" found in the regulations implementing Section 504 of the Rehabilitation Act at 34 CFR part 104. It defines physical or mental impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or any mental or psychological disorder.

The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid.

It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within "normal" range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of the ADA.

Major life activities in the ADA adopts the definition of the term "major life activities" found in the regulations implementing Section 504 of the Rehabilitation Act at 34 CFR part 104. "Major life activities" are those basic activities that the average person

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in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching.

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities. Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability.

The ADA and EEOC regulations implementing the ADA, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors. Other impairments, however, such as HIV infection, are inherently substantially limiting.

On the other hand, temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza. Similarly, except in rare circumstances, obesity is not considered a disabling impairment.

An impairment that prevents an individual from performing a major life activity substantially limits that major life activity. For example, an individual whose legs are paralyzed is substantially limited in the major life activity of walking because he or she is unable, due to the impairment, to perform that major life activity.

Alternatively, an impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity. Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking. An individual who uses artificial legs

would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.

EEOC Title I regulations note several factors that should be considered in making the determination of whether an impairment is substantially limiting. These factors are (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment. The term "duration," as used in this context, refers to the length of time an impairment persists, while the term "impact" refers to the residual effects of an impairment. Thus, for example, a broken leg that takes eight weeks to heal is an impairment of fairly brief duration. However, if the broken leg heals improperly, the "impact" of the impairment would be the resulting permanent limp. Likewise, the effect on cognitive functions resulting from traumatic head injury would be the "impact" of that impairment.

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices. An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the factors noted above, does not amount to a significant restriction when compared with the abilities of the average person. For example, an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at moderately below average speed.

It is important to remember that the restriction on the performance of the major life activity must be the result of a condition that is an impairment. As noted earlier, advanced age, physical or personality characteristics, and environmental, cultural, and economic disadvantages are not impairments. Consequently, even if such factors substantially limit an individual's ability to perform a major life activity, this limitation will not constitute a disability. For example, an individual who is unable to read because he or she was never taught to read would not be an individual with a disability because lack of education is not an impairment. However, an individual who is unable to read because of dyslexia would be an individual with a disability because dyslexia, a learning disability, is an impairment.

If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working. For example, if an individual is blind, i.e., substantially limited in the major life activity of seeing, there is no need to determine whether the individual is also substantially limited in the major life activity of working. The determination of whether an individual is substantially limited in working must also be made on a case by case basis.

The regulations implementing the ADA Title I provisions list specific factors that may be used in making the determination of whether the limitation in working is "substantial." These factors are:

(1) the geographical area to which the individual has reasonable access;

(2) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(3) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Thus, an individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. For example, an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working. Nor would a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball be considered substantially limited in the major life activity of working. In both of these examples, the individuals are not substantially limited in the ability to perform any other major life activity and, with regard to the major life activity of working, are only unable to perform either a particular specialized job or a narrow range of jobs.

On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs. Similarly, suppose an individual has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult. Since this individual would be substantially limited in the ability to perform the broad range of jobs in various classes that are conducted in high rise office buildings within the geographical area to which he or she has reasonable access, he or she would be substantially limited in working.

The terms "number and types of jobs" and "number and types of other jobs," as used in the factors discussed above, are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., "few," "many," "most") from which an individual would be excluded because of an impairment.

If an individual has a "mental or physical impairment" that "substantially limits" his or her ability to perform one or more "major life activities," that individual will satisfy the first part of the regulatory definition of "disability" and will be considered an individual with a disability. An individual who satisfies this first part of the definition of the term "disability" is not required to demonstrate that he or she satisfies either of the other parts of the definition. However, if an individual is unable to satisfy this part of the definition, he or she may be able to satisfy one of the other parts of the definition.

The second part of the definition of disability provides that an individual with a record of an impairment that substantially limits a major life activity is an individual with a disability. The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. For example, this provision protects former cancer patients from discrimination based on their prior medical history. This provision also ensures that individuals are not discriminated against because they have been misclassified as disabled. For

example, individuals misclassified as learning disabled are protected from discrimination on the basis of that erroneous classification.

This part of the definition is satisfied if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities. There are many types of records that could potentially contain this information, including but not limited to, education, medical, or employment records.

The fact that an individual has a record of being a disabled veteran, or of disability retirement, or is classified as disabled for other purposes does not guarantee that the individual will satisfy the definition of "disability" under the ADA. Other statutes, regulations and programs may have a definition of "disability" that is not the same as the definition set forth in the ADA and contained in EEOC regulations. Accordingly, in order for an individual who has been classified in a record as "disabled" for some other purpose to be considered disabled for purposes of the ADA, the impairment indicated in the record must be a physical or mental impairment that substantially limits one or more of the individual's major life activities.

If an individual cannot satisfy either the first part of the definition of "disability" or the second "record of" part of the definition, he or she may be able to satisfy the third part of the definition. The third part of the definition provides that an individual who is regarded by an employer or other covered entity as having an impairment that substantially limits a major life activity is an individual with a disability.

There are three different ways in which an individual may satisfy the definition of "being regarded as having a disability":

(1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;

(2) the individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or

(3) the individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.

An individual satisfies the first part of this definition if the individual has an impairment that is not substantially

limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

An individual satisfies the second part of the "regarded as" definition if the individual has an impairment that is only substantially limiting because of the attitudes of others toward the condition. For example, an individual may have a prominent facial scar or disfigurement, or may have a condition that periodically causes an involuntary jerk of the head but does not limit the individual's major life activities. If an employer discriminates against such an individual because of the negative reactions of customers, the employer would be regarding the individual as disabled and acting on the basis of that perceived disability.

An individual satisfies the third part of the "regarded as" definition of "disability" if the employer or other covered entity erroneously believes the individual has a substantially limiting impairment that the individual actually does not have. This situation could occur, for example, if an employer discharged an employee in response to a rumor that the employee is infected with Human Immunodeficiency Virus (HIV). Even though the rumor is totally unfounded and the individual has no impairment at all, the individual is considered an individual with a disability because the employer perceived of this individual as being disabled. Thus, in this example, the employer, by discharging this employee, is discriminating on the basis of disability.

The rationale for the "regarded as" part of the definition of disability was articulated by the Supreme Court in the context of the Rehabilitation Act of 1973 in School Board of Nassau County v. Arline, 480 U.S. 273 (1987). The Court noted that, although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283. The Court concluded that by including "regarded as" in the Rehabilitation Act's definition, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." 480 U.S. at 284.

An individual rejected from a job because of the "myths, fears and sterotypes" associated with disabilities would be covered under this part of the definition of disability, whether or not the

employer's or other covered entity's perception were shared by others in the field and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. As the legislative history notes, sociologists have identified common attitudinal barriers that frequently result in employers excluding individuals with disabilities. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers' compensation costs, and acceptance by coworkers and customers.

Therefore, if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear or stereotype" can be drawn.

FACTS ABOUT DISABILITY-RELATED TAX PROVISIONS

The three disability-related provisions in the Internal Revenue Code are of particular interest to businesses and people with disabilities.

TARGETED JOBS TAX CREDIT

(Title 26, Internal Revenue Code, section 51)

Employers are eligible to receive a tax credit in the amount of 40 percent of the first $6,000 of first-year wages of a new employee who has a disability. There is no credit after the first year of employment. For an employer to qualify for the credit, a worker must have been employed for at least 90 days or have completed at least 120 hours of work for the employer. The Revenue Reconciliation Act of 1990, Public Law 101-508, extended this tax credit through December 31, 1991.

TAX DEDUCTION TO REMOVE ARCHITECTURAL AND TRANSPORTATION BARRIERS TO PEOPLE WITH DISABILITIES AND ELDERLY INDIVIDUALS

(Title 26, Internal Revenue Code, section 190)

Allows a deduction for "qualified architectural and transportation barrier removal expenses." Only expenditures that are for the purpose of making any facility or public transportation vehicle owned or leased by the taxpayer for use in connection with his or her trade or business more accessible to, and usable by, handicapped and elderly individuals are eligible for the deduction. The taxpayer must establish, to the satisfaction of the Secretary of the Treasury, that the resulting removal of the barrier meets the standards promulgated by the Secretary with the concurrence of the U.S. Architectural and Transportation Barriers Compliance Board.

For purposes of this section, a "handicapped individual" is any individual who has a physical or mental disability (including, but not limited to, deafness and blindness) which, for that individual, constitutes or results in a functional limitation to employment, or who has any physical or mental impairment that substantially limits one or more major life activities of the individual.

The deduction may not exceed $15,000 for any taxable year. (The maximum deduction had been $35,000 prior to passage of Public Law 101-508 in 1990, which lowered the maximum deduction.)

(over)

DISABLED ACCESS TAX CREDIT
(Title 26, Internal Revenue Code, section 44)

This tax credit is available to "eligible small businesses" in the amount of 50 percent of "eligible access expenditures" for the taxable year that exceed $250 but do not exceed $10,250.

"Eligible small businesses" are those businesses with either:

a) $1 million or less in gross receipts for the preceding tax year; or
b) 30 or fewer full-time employees during the preceding tax year.

"Eligible access expenditures" means amounts paid or incurred by an eligible small business for the purpose of enabling the small business to comply with the applicable requirements under ADA. Certain types of expenditures are listed as included under the meaning of the term "eligible access expenditures." These include amounts paid or incurred:

i) for the purpose of removing architectural, communication, physical, or transportation barriers that prevent a business from being accessible to, or usable by, individuals with disabilities;
ii) to provide qualified readers, taped texts, and other effective methods of making visually delivered materials available to people with visual impairments;
iii) to provide qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
iv) to acquire or modify equipment, or devices for individuals with disabilities; or
v) to provide other similar services, modifications, materials or equipment.

Expenditures that are not necessary to accomplish the above mentioned purposes are not eligible. Expenses in connection with new construction are not eligible. "Disability" has the same meaning as it does in the ADA. Barrier removals or the provision of services, modifications, materials, or equipment must meet standards promulgated by the Secretary in order to be eligible.

Example: Company A purchases equipment to meet its reasonable accomodation obligation under ADA for $8,000. The amount by which $8,000 exceeds $250 is $7,750. Fifty percent of $7,750 is $3,875. The employer may take a tax credit in the amount of $3,875 on its next tax return.

Example: Company B removes a physical barrier in accordance with its reasonable accommodation obligation under ADA. The barrier removal meets standards promulgated by the Secretary. The company expends $12,000 on this barrier removal. The amount by which $12,000 exceeds $250 but not $10,250 is a full $10,000. Fifty percent of $10,000 is $5,000. Company B is eligible for a $5,000 tax credit on its next tax return.

For further information on these provisions, contact the Internal Revenue Service, Office of the Chief Counsel, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044 (voice only).

December 1991 EEOC-FS/E6

Disability-Related Tax Provisions Applicable to Businesses

The three disability-related provisions in the Internal Revenue Code applicable to businesses described below are of particular interest to businesses and people with disabilities:

1) **Targeted Jobs Tax Credit** (Title 26, Internal Revenue Code, section 51)

Employers are eligible to receive a tax credit in the amount of 40 percent of the first $6,000 of first-year wages of a new employee who has a disability. There is no credit after the first year of employment. For an employer to qualify for the credit, a worker must have been employed for at least 90 days or have completed at least 120 hours of work for the employer. The Revenue Reconciliation Act of 1990, Public Law 101-508, extended this tax credit through December 31, 1991.

2) **Tax Deduction to Remove Architectural and Transportation Barriers to People with Disabilities and Elderly Individuals** (Title 26, Internal Revenue Code, section 190)

Allows a deduction for "qualified architectural and transportation barrier removal expenses." Only expenditures that are for the purpose of making any facility or public transportation vehicle owned or leased by the taxpayer for use in connection with his or her trade or business more accessible to, and usable by, handicapped and elderly individuals are eligible for the deduction. The taxpayer must establish, to the satisfaction of the Secretary of the Treasury, that the resulting removal of the barrier meets the standards promulgated by the Secretary with the concurrence of the U.S. Architectural and Transportation Barriers Compliance Board.

For purposes of this section, a "handicapped individual" is any individual who has a physical or mental disability (including, but not limited to, deafness and blindness) which, for that individual, constitutes or results in a functional limitation to employment, or who has any physical or mental impairment that substantially limits one or more major life activities of that individual.

The deduction may not exceed $15,000 for any taxable year. (The maximum deduction had been $35,000 prior to passage of Public Law 101-508 in 1990, which lowered the maximum deduction.)

3) **Disabled Access Tax Credit** (Title 26, Internal Revenue Code, section 44)

This tax credit is available to "eligible small businesses" in the amount of 50 percent of "eligible access expenditures" for the taxable year that exceed $250 but do not exceed $10,250.

"Eligible small businesses" are those businesses with either:

a) $1 million or less in gross receipts for the preceding tax year

OR

b) 30 or fewer full-time employees during the preceding tax year.

"Eligible access expenditures" means amounts paid or incurred by an eligible small business for the purpose of enabling the small business to comply with applicable requirements under ADA. Certain types of expenditures are listed as included under the meaning of the term "eligible access expenditures." These include amounts paid or incurred:

i) for the purpose of removing architectural, communication, physical, or transportation barriers that prevent a business from being accessible to, or usable by, individuals with disabilities;

ii) to provide qualified readers, taped texts, and other effective methods of making visually delivered materials available to people with visual impairments;

iii) to provide qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

iv) to acquire or modify equipment, or devices for individuals with disabilities, or

v) to provide other similar services, modifications, materials, or equipment.

Expenditures that are not necessary to accomplish the above mentioned purposes are not eligible. Expenses in connection with new construction are not eligible. "Disability" has the same meaning as it does in the ADA. Barrier removals or the provision of services, modifications, materials, or equipment must meet standards promulgated by the Secretary in order to be eligible.

Example: Company A purchases equipment to meet its reasonable accommodation obligation under ADA for $8,000. The amount by which $8,000 exceeds $250 is $7,750. Fifty percent of $7,750 is $3,875. The employer may take a tax credit in the amount of $3,875 on its next tax return.

Example: Company B removes a physical barrier in accordance with its reasonable accommodation obligation under ADA. The barrier removal meets standards promulgated by the Secretary.

The company expends $12,000 on this barrier removal. The amount by which $12,000 exceeds $250 but not $10,250 is a full $10,000. Fifty percent of $10,000 is $5,000. Company B is eligible for a $5,000 tax credit on its next tax return.

For further information on these provisions, contact the **Internal Revenue Service, Office of the Chief Counsel, P.O. Box 7604, Ben Franklin Station, Washington D.C. 20044 (202) 566-3292 (voice only).**

U.S. Equal Employment
Opportunity Commission

U.S. Department of Justice
Civil Rights Division

The Americans with Disabilities Act Questions and Answers

Introduction

Barriers to employment, transportation, public accommodations, public services, and telecommunications have imposed staggering economic and social costs on American society and have undermined our well-intentioned efforts to educate, rehabilitate, and employ individuals with disabilities. By breaking down these barriers, the Americans with Disabilities Act will enable society to benefit from the skills and talents of individuals with disabilities, will allow us all to gain from their increased purchasing power and ability to use it, and will lead to fuller, more productive lives for all Americans.

The Americans with Disabilities Act gives civil rights protections to individuals with disabilities similar to those provided to individuals on the basis of race, sex, national origin, age, and religion. It guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, State and local government services, and telecommunications.

Fair, swift, and effective enforcement of this landmark civil rights legislation is a high priority of the Bush Administration. This booklet is designed to provide answers to some of the most often asked questions about the new law.

Dick Thornburgh
Attorney General

Evan J. Kemp, Jr.
Chairman, U.S. Equal
Employment Opportunity
Commission

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July, 1991

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Employment

Q. What employers are covered by the ADA, and when is the coverage effective?

A. The employment provisions apply to private employers, State and local governments, employment agencies, and labor unions. Employers with 25 or more employees will be covered starting July 26, 1992, when the employment provisions go into effect. Employers with 15 or more employees will be covered two years later, beginning July 26, 1994.

Q. What practices and activities are covered by the employment nondiscrimination requirements?

A. The ADA prohibits discrimination in all employment practices, including job application procedures, hiring, firing, advancement, compensation, training, and other terms, conditions, and privileges of employment. It applies to recruitment, advertising, tenure, layoff, leave, fringe benefits, and all other employment-related activities.

Q. Who is protected against employment discrimination?

A. Employment discrimination is prohibited against "qualified individuals with disabilities." Persons discriminated against because they have a known association or relationship with a disabled individual also are protected. The ADA defines an "individual with a disability" as a person who has a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or is regarded as having such an impairment.

The first part of the definition makes clear that the ADA applies to persons who have substantial, as distinct from minor, impairments, and that these must be impairments that limit major life activities such as seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, and working. An

individual with epilepsy, paralysis, a substantial hearing or visual impairment, mental retardation, or a learning disability would be covered, but an individual with a minor, nonchronic condition of short duration, such as a sprain, infection, or broken limb, generally would not be covered.

The second part of the definition would include, for example, a person with a history of cancer that is currently in remission or a person with a history of mental illness.

The third part of the definition protects individuals who are regarded and treated as though they have a substantially limiting disability, even though they may not have such an impairment. For example, this provision would protect a severely disfigured qualified individual from being denied employment because an employer feared the "negative reactions" of others.

Q. Who is a "qualified individual with a disability"?

A. A qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the "essential functions" of the position with or without reasonable accommodation. Requiring the ability to perform "essential" functions assures that an individual will not be considered unqualified simply because of inability to perform marginal or incidental job functions. If the individual is qualified to perform essential job functions except for limitations caused by a disability, the employer must consider whether the individual could perform these functions with a reasonable accommodation. If a written job description has been prepared in advance of advertising or interviewing applicants for a job, this will be considered as evidence, although not necessarily conclusive evidence, of the essential functions of the job.

Q. Does an employer have to give preference to a qualified applicant with a disability over other applicants?

A. No. An employer is free to select the most qualified applicant available and to make decisions based on reasons unrelated to the existence or consequence of a disability. For example, if two persons apply for a job opening as a typist, one a person with a disability who accurately types 50 words per minute, the other a person without a disability who accurately types 75 words per minute, the employer may hire the applicant with the higher typing speed, if typing speed is needed for successful performance of the job.

Q. What is "reasonable accommodation"?

A. Reasonable accommodation is any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has the same rights and privileges in employment as nondisabled employees.

Q. What kinds of actions are required to reasonably accommodate applicants and employees?

A. Examples of reasonable accommodation include making existing facilities used by employees readily accessible to and usable by an individual with a disability; restructuring a job; modifying work schedules; acquiring or modifying equipment; providing qualified readers or interpreters; or appropriately modifying examinations, training, or other programs. Reasonable accommodation also may include reassigning a current employee to a vacant position for which the individual is qualified, if the person becomes disabled and is unable to do the original job. However, there is no obligation to find a position for an applicant who is not qualified for the position sought. Employers are not required to lower quality or quantity standards in

order to make an accommodation, nor are they obligated to provide personal use items such as glasses or hearing aids.

The decision as to the appropriate accommodation must be based on the particular facts of each case. In selecting the particular type of reasonable accommodation to provide, the principal test is that of effectiveness, i.e., whether the accommodation will enable the person with a disability to do the job in question.

Q. Must employers be familiar with the many diverse types of disabilities to know whether or how to make a reasonable accommodation?

A. No. An employer is only required to accommodate a "known" disability of a qualified applicant or employee. The requirement generally will be triggered by a request from an individual with a disability, who frequently can suggest an appropriate accommodation. Accommodations must be made on an individual basis, because the nature and extent of a disabling condition and the requirements of the job will vary in each case. If the individual does not request an accommodation, the employer is not obligated to provide one. If a disabled person requests, but cannot suggest, an appropriate accommodation, the employer and the individual should work together to identify one. There are also many public and private resources that can provide assistance without cost.

Q. What are the limitations on the obligation to make a reasonable accommodation?

A. The disabled individual requiring the accommodation must be otherwise qualified, and the disability must be known to the employer. In addition, an employer is not required to make an accommodation if it would impose an "undue hardship" on the operation of the employer's business. "Undue hardship" is defined as "an action requiring significant difficulty or expense" when considered in light of a number of factors. These factors include the nature and cost of the accommoda-

tion in relation to the size, resources, nature, and structure of the employer's operation. Where the facility making the accommodation is part of a larger entity, the structure and overall resources of the larger organization would be considered, as well as the financial and administrative relationship of the facility to the larger organization. In general, a larger employer would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer.

Q. Must an employer modify existing facilities to make them accessible?

A. An employer may be required to modify facilities to enable an individual to perform essential job functions and to have equal opportunity to participate in other employment-related activities. For example, if an employee lounge is located in a place inaccessible to a person using a wheelchair, the lounge might be modified or relocated, or comparable facilities might be provided in a location that would enable the individual to take a break with co-workers.

Q. May an employer inquire as to whether a prospective employee is disabled?

A. An employer may not make a pre-employment inquiry on an application form or in an interview as to whether, or to what extent, an individual is disabled. The employer may ask a job applicant whether he or she can perform particular job functions. If the applicant has a disability known to the employer, the employer may ask how he or she can perform job functions that the employer considers difficult or impossible to perform because of the disability, and whether an accommodation would be needed. A job offer may be conditioned on the results of a medical examination, provided that the examination is required for all entering employees in the same job category regardless of disability, and that information obtained is handled according to confidentiality requirements specified in the Act. After an employee enters on duty, all medical examinations and inquiries must be

job related and necessary for the conduct of the employer's business. These provisions of the law are intended to prevent the employer from basing hiring and employment decisions on unfounded assumptions about the effects of a disability.

Q. Does the ADA take safety issues into account?

A. Yes. The ADA permits employers to establish qualification standards that will exclude individuals who pose a direct threat -- i.e., a significant risk -- to the health and safety of the individual or of others, if that risk cannot be lowered to an acceptable level by reasonable accommodation. However, an employer may not simply assume that a threat exists; the employer must establish through objective, medically supportable methods that there is genuine risk that substantial harm could occur in the workplace. By requiring employers to make individualized judgments based on reliable medical or other objective evidence rather than on generalizations, ignorance, fear, patronizing attitudes, or stereotypes, the ADA recognizes the need to balance the interests of people with disabilities against the legitimate interests of employers in maintaining a safe workplace.

Q. Can an employer refuse to hire an applicant or fire a current employee who is illegally using drugs?

A. Yes. Individuals who currently engage in the illegal use of drugs are specifically excluded from the definition of a "qualified individual with a disability" protected by the ADA when an action is taken on the basis of their drug use.

Q. Is testing for illegal drugs permissible under the ADA?

A. Yes. A test for illegal drugs is not considered a medical examination under the ADA; therefore, employers may conduct such testing of applicants or employees and make employment decisions based on the results. The ADA does not encourage, prohibit, or authorize drug tests.

Q. Are people with AIDS covered by the ADA?

A. Yes. The legislative history indicates that Congress intended the ADA to protect persons with AIDS and HIV disease from discrimination.

Q. How does the ADA recognize public health concerns?

A. No provision in the ADA is intended to supplant the role of public health authorities in protecting the community from legitimate health threats. The ADA recognizes the need to strike a balance between the right of a disabled person to be free from discrimination based on unfounded fear and the right of the public to be protected.

Q. What is discrimination based on "relationship or association"?

A. The ADA prohibits discrimination based on relationship or association in order to protect individuals from actions based on unfounded assumptions that their relationship to a person with a disability would affect their job performance, and from actions caused by bias or misinformation concerning certain disabilities. For example, this provision would protect a person with a disabled spouse from being denied employment because of an employer's unfounded assumption that the applicant would use excessive leave to care for the spouse. It also would protect an individual who does volunteer work for people with AIDS from a discriminatory employment action motivated by that relationship or association.

Q. Will the ADA increase litigation burdens on employers?

A. Some litigation is inevitable. However, employers who use the period prior to the effective date of employment coverage to adjust their policies and practices to conform to ADA requirements will be much less likely to have serious litigation concerns. In drafting the ADA, Congress relied heavily on the language of the Rehabilitation Act of 1973 and its implementing regulations. There is already an extensive body of law interpreting the requirements of that Act to

which employers can turn for guidance on their ADA obligations. The Equal Employment Opportunity Commission will issue specific regulatory guidance one year before the ADA's employment provisions take effect, publish a technical assistance manual with guidance on how to comply, and provide other assistance to help employers meet ADA requirements. Equal employment opportunity for people with disabilities will be achieved most quickly and effectively through widespread voluntary compliance with the law, rather than through reliance on litigation to enforce compliance.

Q. How will the employment provisions be enforced?

A. The employment provisions of the ADA will be enforced under the same procedures now applicable to race, sex, national origin, and religious discrimination under title VII of the Civil Rights Act of 1964. Complaints regarding actions that occur after July 26, 1992, may be filed with the Equal Employment Opportunity Commission or designated State human rights agencies. Available remedies will include hiring, reinstatement, back pay, and court orders to stop discrimination.

For information on how to contact the Equal Employment Opportunity Commission, see page 19.

Public Accommodations

Q. What are public accommodations?

A. Public accommodations are private entities that affect commerce. The ADA public accommodations requirements extend, therefore, to a wide range of entities, such as restaurants, hotels, theaters, doctors' offices, pharmacies, retail stores, museums, libraries, parks, private schools, and day care centers. Private clubs and religious organizations are exempt from the ADA's requirements for public accommodations.

Q. Will the ADA have any effect on the eligibility criteria used by public accommodations to determine who may receive services?

A. Yes. If a criterion screens out or tends to screen out individuals with disabilities, it may only be used if necessary for the provision of the services. For instance, it would be a violation for a retail store to have a rule excluding all deaf persons from entering the premises, or for a movie theater to exclude all individuals with cerebral palsy. More subtle forms of discrimination are also prohibited. For example, requiring presentation of a driver's license as the sole acceptable means of identification for purposes of paying by check could constitute discrimination against individuals with vision impairments. This would be true if such individuals are ineligible to receive licenses and the use of an alternative means of identification is feasible.

Q. Does the ADA allow public accommodations to take safety factors into consideration in providing services to individuals with disabilities?

A. The ADA expressly provides that a public accommodation may exclude an individual, if that individual poses a direct threat to the health or safety of others that cannot be mitigated by appropriate modifications in the public accommodation's policies or procedures, or by the provision of auxiliary aids. A public accommodation will be permitted to establish objective safety criteria for the operation of its

business; however, any safety standard must be based on objective requirements rather than stereotypes or generalizations about the ability of persons with disabilities to participate in an activity.

Q. Are there any limits on the kinds of modifications in policies, practices, and procedures required by the ADA?

A. Yes. The ADA does not require modifications that would fundamentally alter the nature of the services provided by the public accommodation. For example, it would not be discriminatory for a physician specialist who treats only burn patients to refer a deaf individual to another physician for treatment of a broken limb or respiratory ailment. To require a physician to accept patients outside of his or her specialty would fundamentally alter the nature of the medical practice.

Q. What kinds of auxiliary aids and services are required by the ADA to ensure effective communication with individuals with hearing or vision impairments?

A. Appropriate auxiliary aids and services may include services and devices such as qualified interpreters, assistive listening devices, notetakers, and written materials for individuals with hearing impairments; and qualified readers, taped texts, and Brailled or large print materials for individuals with vision impairments.

Q. Are there any limitations on the ADA's auxiliary aids requirements?

A. Yes. The ADA does not require the provision of any auxiliary aid that would result in an undue burden or in a fundamental alteration in the nature of the goods or services provided by a public accommodation. However, the public accommodation is not relieved from the duty to furnish an alternative auxiliary aid, if available, that would not result in a fundamental alteration or undue burden. Both of these limitations are derived from existing regulations and caselaw under section 504 and are to be determined on a case-by-case basis.

Q. Will restaurants be required to have Brailled menus?

A. No, not if waiters or other employees are made available to read the menu to a blind customer.

Q. Will a clothing store be required to have Brailled price tags?

A. No. Sales personnel could provide price information orally upon request.

Q. Will a bookstore be required to maintain a sign language interpreter on its staff in order to communicate with deaf customers?

A. No, not if employees communicate by pen and notepad when necessary.

Q. Are there any limitations on the ADA's barrier removal requirements for existing facilities?

A. Yes. Barrier removal need only be accomplished when it is "readily achievable" to do so.

Q. What does the term "readily achievable" mean?

A. It means "easily accomplishable and able to be carried out without much difficulty or expense."

Q. What are examples of the types of modifications that would be readily achievable in most cases?

A. Examples include the simple ramping of a few steps, the installation of grab bars where only routine reinforcement of the wall is required, the lowering of telephones, and similar modest adjustments.

Q. Will businesses need to rearrange furniture and display racks?

A. Possibly. For example, restaurants may need to rearrange tables and

department stores may need to adjust their layout of racks and shelves in order to permit wheelchair access.

Q. Will businesses need to install elevators?

A. Businesses are not required to retrofit their facilities to install elevators unless such installation is readily achievable, which is unlikely in most cases.

Q. When barrier removal is not readily achievable, what kinds of alternative steps are required by the ADA?

A. Alternatives may include such measures as in-store assistance for removing articles from high shelves, home delivery of groceries, or coming to the door to receive or return dry cleaning.

Q. Must alternative steps be taken without regard to cost?

A. No, only readily achievable alternative steps must be undertaken.

Q. How is "readily achievable" determined in a multisite business?

A. In determining whether an action to make a public accommodation accessible would be "readily achievable," the overall size of the parent corporation or entity is only one factor to be considered. The ADA also permits consideration of the financial resources of the particular facility or facilities involved and the administrative or fiscal relationship of the facility or facilities to the parent entity.

Q. Who has responsibility for removing barriers in a shopping mall, the landlord who owns the mall or the tenant who leases the store?

A. Legal responsibility for removing barriers depends upon who has legal authority to make alterations, which is generally determined by the contractual agreement between the landlord and tenant. In most cases the landlord will have full control over common areas.

Q. What does the ADA require in new construction?

A. The ADA requires that all new construction of places of public accommodation, as well as of "commercial facilities" such as office buildings, be accessible. Elevators are generally not required in facilities under three stories or with fewer than 3,000 square feet per floor, unless the building is a shopping center, mall, or professional office of a health care provider.

Q. Is it expensive to make all newly constructed public accommodations and commercial facilities accessible?

A. The cost of incorporating accessibility features in new construction is less than one percent of construction costs. This is a small price in relation to the economic benefits to be derived from full accessibility in the future, such as increased employment and consumer spending and decreased welfare dependency.

Q. Must every feature of a new facility be accessible?

A. No, only a reasonable number of elements such as parking spaces and bathrooms must be made accessible in order for a facility to be "readily accessible." Moreover, mechanical areas, such as catwalks and fan rooms, to which access is required only for purposes of maintenance and repairs, might not need to be physically accessible if the essential functions of the work performed in those areas require physical mobility.

Q. What are the ADA requirements for altering facilities?

A. All alterations that could affect the usability of a facility must be made in an accessible manner to the maximum extent feasible. For example, if during renovations a doorway is being relocated, the new doorway must be wide enough to meet the new construction standard for accessibility. When alterations are made to a primary function area, such as the lobby of a bank or the dining area of a cafeteria, an accessible

path of travel to the altered area must also be provided. The bathrooms, telephones, and drinking fountains serving that area must also be made accessible. These additional accessibility alterations are only required to the extent that the added accessibility costs are not disproportionate to the overall cost of the alterations. Elevators are generally not required in facilities under three stories or with fewer than 3000 square feet per floor, unless the building is a shopping center, mall, or professional office of a health care provider.

Q. Does the ADA permit a disabled person to sue a business when that individual believes that discrimination is about to occur, or must the individual wait for the discrimination to occur?

A. The ADA public accommodations provisions permit an individual to allege discrimination based on a disabled person's reasonable belief that discrimination is about to occur. This provision allows a person who uses a wheelchair to challenge the planned construction of a new place of public accommodation, such as a shopping mall, that would not be accessible to wheelchair users. The resolution of such challenges prior to the construction of an inaccessible facility would enable any necessary remedial measures to be incorporated in the building at the planning stage, when such changes would be relatively inexpensive.

Q. How does the ADA affect existing State and local building codes?

A. Existing codes remain in effect. The ADA allows the Attorney General to certify that a State law, local building code, or similar ordinance that establishes accessibility requirements meets or exceeds the minimum accessibility requirements for public accommodations and commercial facilities. Any State or local government may apply for certification of its code or ordinance. The Attorney General can certify a code or ordinance only after prior notice and a public hearing at which interested people, including individuals with disabilities, are provided an opportunity to testify against the certification.

Q. What is the effect of certification of a State or local code or ordinance?

A. Certification can be advantageous if an entity has constructed or altered a facility according to a certified code or ordinance. If someone later brings an enforcement proceeding against the entity, the certification is considered "rebuttable evidence" that the State law or local ordinance meets or exceeds the minimum requirements of the ADA. In other words, the entity can argue that the construction or alteration met the requirements of the ADA because it was done in compliance with the State or local code that had been certified.

Q. When are the public accommodations provisions effective?

A. In general, they become effective on January 26, 1992.

Q. How will the public accommodations provisions be enforced?

A. Private individuals may bring lawsuits in which they can obtain court orders to stop discrimination. Individuals may also file complaints with the Attorney General, who is authorized to bring lawsuits in cases of general public importance or where a "pattern or practice" of discrimination is alleged. In these cases, the Attorney General may seek monetary damages and civil penalties. Civil penalties may not exceed $50,000 for a first violation or $100,000 for any subsequent violation.

For information on how to contact the U.S. Department of Justice, see page 18.

Miscellaneous

Q. Is the Federal government covered by the ADA?

A. The ADA does not cover the executive branch of the Federal Government. The executive branch continues to be covered by title V of the Rehabilitation Act of 1973, which prohibits discrimination in services and employment on the basis of handicap and which is a model for the requirements of the ADA. The ADA, however, does cover Congress and other entities in the legislative branch of the Federal Government.

Q. What requirements, other than those mandating nondiscrimination in employment, does the ADA place on State and local governments?

A. All government facilities, services, and communications must be accessible consistent with the requirements of section 504 of the Rehabilitation Act of 1973. Individuals may file complaints with Federal agencies to be designated by the Attorney General or bring private lawsuits.

Q. Does the ADA cover private apartments and private homes?

A. The ADA generally does not cover private residential facilities. These facilities are addressed in the Fair Housing Amendments Act of 1988, which prohibits discrimination on the basis of disability in selling or renting housing. If a building contains both residential and nonresidential portions, only the nonresidential portions are covered by the ADA. For example, in a large hotel that has a residential apartment wing, the residential wing would be covered by the Fair Housing Act and the other rooms would be covered by the ADA.

Q. Does the ADA cover air transportation?

A. Discrimination by air carriers is not covered by the ADA but rather by the Air Carrier Access Act (49 U.S.C. 1374 (c)).

Q. What are the ADA's requirements for public transit buses?

A. The ADA requires the Department of Transportation to issue regulations mandating accessible public transit vehicles and facilities. The regulations must include a requirement that all new fixed-route, public transit buses be accessible and that supplementary paratransit services be provided for those individuals with disabilities who cannot use fixed-route bus service. For information on how to contact the Department of Transportation, see page 19.

Q. How will the ADA make telecommunications accessible?

A. The ADA requires the establishment of telephone relay services for individuals who use telecommunications devices for the deaf (TDD's) or similar devices. The Federal Communications Commission will issue regulations specifying standards for the operation of these services. For information on how to contact the Federal Communications Commission, see page 19.

Q. Are businesses entitled to any tax benefit to help pay for the cost of compliance?

A. As amended in 1990, the Internal Revenue Code allows a deduction of up to $15,000 per year for expenses associated with the removal of qualified architectural and transportation barriers.

The 1990 amendment also permits eligible small businesses to receive a tax credit for certain costs of compliance with the ADA. An eligible small business is one whose gross receipts do not exceed $1,000,000 or whose workforce does not consist of more than 30 full-time workers. Qualifying businesses may claim a credit of up to 50 percent of eligible access expenditures that exceed $250 but do not exceed $10,250. Examples of eligible access expenditures include the necessary and reasonable costs of removing architectural, physical, communications, and transportation barriers; providing readers, interpreters, and other auxiliary aids; and acquiring or modifying equipment or devices.

Resources

This document is available in the following alternate formats:

- Braille
- Large Print
- Audiotape
- Electronic file on computer disk and electronic bulletin board (202) 514-6193

For more specific information about ADA requirements affecting Public Services and Public Accommodations contact:

✍
Office on the Americans with Disabilities Act
Civil Rights Division
U.S. Department of Justice
P.O. Box 66118
Washington, D.C. 20035-6118
☎
(202) 514-0301 (Voice)
(202) 514-0381 (TDD)
(202) 514-0383 (TDD)

50-276 0 - 92 - 4

Resources

For more specific information about ADA requirements affecting employment contact:

Equal Employment Opportunity Commission
1801 L Street NW
Washington, DC 20507
(202) 663-4900 (Voice)
800-800-3302 (TDD)
(202) 663-4494 (TDD - for 202 Area Code)

For more specific information about ADA requirements affecting transportation contact:

Department of Transportation
400 Seventh Street SW
Washington, DC 20590
(202) 366-9305 (Voice)
(202) 755-7687 (TDD)

For more specific information about requirements for accessible design in new construction and alterations contact:

Architectural and Transportation Barriers Compliance Board
1111 18th Street NW
Suite 501
Washington, DC 20036
800-USA-ABLE (Voice)
800-USA-ABLE (TDD)

For more specific information about ADA requirements affecting telecommunications contact:

Federal Communications Commission
1919 M Street NW
Washington, DC 20554
(202) 632-7260 (Voice)
(202) 632-6999 (TDD)

CRD-87

U.S. Equal Employment Opportunity Commission

The Americans With Disabilities Act

Your Employment Rights as an Individual With a Disability

EEOC-BK-18
1991

Introduction

The Americans with Disabilities Act of 1990 (ADA) makes it unlawful to discriminate in employment against a qualified individual with a disability. The ADA also outlaws discrimination against individuals with disabilities in state and local government services, public accommodations, transportation and telecommunications. This booklet explains the part of the ADA that prohibits job discrimination. This part of the law is enforced by the U.S. Equal Employment Opportunity Commission (EEOC) and state and local civil rights enforcement agencies that work with the Commission.

What Employers Are Covered by the ADA?

Job discrimination against people with disabilities is illegal if practiced by:

- private employers,
- state and local governments,
- employment agencies,
- labor organizations,
- and labor-management committees.

The part of the ADA enforced by the EEOC outlaws job discrimination by:

- all employers, including state and local government employers, with 25 or more employees after July 26, 1992, and
- all employers, including state and local government employers, with 15 or more employees after July 26, 1994.

Another part of the ADA, enforced by the U.S. Department of Justice (DOJ), prohibits discrimination in state and local government programs and activities, including job discrimination by all state and local governments, regardless of the number of employees, after January 26, 1992.

Because the ADA gives responsibilities to both EEOC and DOJ for employment by state and local governments, these agencies will coordinate the federal enforcement effort. In addition, since some private and governmental employers are already covered by nondiscrimination and affirmative action requirements under the Rehabilitation Act of 1973, EEOC, DOJ, and the Department of Labor also will coordinate the enforcement effort under the ADA and the Rehabilitation Act.

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Are You Protected by The ADA?

If you have a disability and are qualified to do a job, the ADA protects you from job discrimination on the basis of your disability. Under the ADA, you have a disability if you have a ***physical or mental impairment*** that ***substantially limits a major life activity***. The ADA also protects you if you have a history of such a disability, or if an employer believes that you have such a disability, even if you don't.

To be protected under the ADA, you must have, have a record of, or be regarded as having a ***substantial***, as opposed to a minor, impairment. A substantial impairment is one that significantly limits or restricts a ***major life activity*** such as hearing, seeing, speaking, walking, breathing, performing manual tasks, caring for oneself, learning or working.

If you have a disability, you must also be qualified to perform the essential functions or duties of a job, with or without reasonable accommodation, in order to be protected from job discrimination by the ADA. This means two things. First, you must satisfy the employer's requirements for the job, such as education, employment experience, skills or licenses. Second, you must be able to perform the ***essential functions*** of the job with or without ***reasonable accommodation***. Essential functions are the fundamental job duties that you must be able to perform on your own or with the help of a reasonable accommodation. An employer cannot refuse to hire you because your disability prevents you from performing duties that are not essential to the job.

What is Reasonable Accommodation?

Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities. For example, reasonable accommodation may include:

- providing or modifying equipment or devices,
- job restructuring,
- part-time or modified work schedules,
- reassignment to a vacant position,
- adjusting or modifying examinations, training materials, or policies,
- providing readers and interpreters, and
- making the workplace readily accessible to and usable by people with disabilities.

An employer is required to provide a reasonable accommodation to a qualified applicant or employee with a disability unless the employer can show that the accommodation would be an ***undue hardship*** -- that is, that it would require significant difficulty or expense.

What Employment Practices are Covered?

The ADA makes it unlawful to discriminate in all employment practices such as:

- recruitment
- hiring
- job assignments
- pay
- lay off
- firing
- training
- promotions
- benefits
- leave
- all other employment related activities.

It is also unlawful for an employer to retaliate against you for asserting your rights under the ADA. The Act also protects you if you are a victim of discrimination because of your family, business, social or other relationship or association with an individual with a disability.

Can an Employer Require Medical Examinations or Ask Questions About a Disability?

If you are applying for a job, an employer cannot ask you if you are disabled or ask about the nature or severity of your disability. An employer can ask if you can perform the duties of the job with or without reasonable accommodation. An employer can also ask you to describe or to demonstrate how, with or without reasonable accommodation, you will perform the duties of the job.

An employer cannot require you to take a medical examination before you are offered a job. Following a job offer, an employer can condition the offer on your passing a required medical examination, but only if all entering employees for that job category have to take the examination. However, an employer cannot reject you because of information about your disability revealed by the medical examination, unless the reasons for rejection are job-related and necessary for the conduct of the employer's business. Nor can the employer refuse to hire you because of your disability if you can perform the essential functions of the job with an accommodation.

Once you have been hired and started work, your employer cannot require that you take a medical examination or ask questions about your disability unless they are related to your job and necessary for the conduct of your employer's business. Your employer may conduct voluntary medical examinations that are part of an employee health program, and may provide medical information required by state workers' compensation laws to the agencies that administer such laws.

The results of all medical examinations must be kept confidential, and maintained in separate medical files.

Do Individuals Who Use Drugs Illegally Have Rights Under the ADA?

Anyone who is currently using drugs illegally is not protected by the ADA and may be denied employment or fired on the basis of such use. The ADA does not prevent employers from testing applicants or employees for current illegal drug use.

What Do I Do If I Think That I'm Being Discriminated Against?

If you think you have been discriminated against in employment on the basis of disability after July 26, 1992, you should contact the EEOC. A charge of discrimination generally must be filed within 180 days of the alleged discrimination. You may have up to 300 days to file a charge if there is a state or local law that provides relief for discrimination on the basis of disability. However, to protect your rights, it is best to contact EEOC promptly if discrimination is suspected.

You may file a charge of discrimination on the basis of disability by contacting any EEOC field office, located in cities throughout the United States. If you have been discriminated against, you are entitled to a remedy that will place you in the position you would have been in if the discrimination had never occurred. You may be entitled to hiring, promotion, reinstatement, back pay, or reasonable accommodation, including reassignment. You may also be entitled to attorney's fees.

While the EEOC can only process ADA charges based on actions occurring on or after July 26, 1992, you may already be protected by state or local laws or by other current federal laws. EEOC field offices can refer you to the agencies that enforce those laws.

To contact the EEOC, look in your telephone directory under U.S. Government. For information and instructions on reaching your local office, call:

(202) 663-4900 (Voice)
(800) 800-3302 (TDD)
(In the Washington, D.C. 202 Area Code, call 202-663-4494 (TDD).)

Can I Get Additional ADA Information and Assistance?

The EEOC will conduct an active technical assistance program to promote voluntary compliance with the ADA. This program will be designed to help people with disabilities understand their rights and to help employers understand their responsibilities under the law.

In January 1992, EEOC will publish a Technical Assistance Manual, providing practical application of legal requirements to specific employment activities, with a directory of resources to aid compliance. EEOC will publish other educational materials, provide training on the law for people with disabilities and for employers, and participate in meetings and training programs of other organizations. EEOC staff also will respond to individual requests for information and assistance. The Commission's technical assistance program will be separate and distinct from its enforcement responsibilities. Employers who seek information or assistance from the Commission will not be subject to any enforcement action because of such inquiries.

The Commission also recognizes that differences and disputes about ADA requirements may arise between employers and people with disabilities as a result of misunderstandings. Such disputes frequently can be resolved more effectively through informal negotiation or mediation procedures, rather than through the formal enforcement process of the ADA. Accordingly, EEOC will encourage efforts of employers and individuals with disabilities to settle such differences through alternative methods of dispute resolution, providing that such efforts do not deprive any individual of legal rights provided by the statute.

More Questions and Answers About the ADA

Q. Is an employer required to provide reasonable accommodation when I apply for a job?

A. Yes. Applicants, as well as employees, are entitled to reasonable accommodation. For example, an employer may be required to provide a sign language interpreter during a job interview for an applicant who is deaf or hearing impaired, unless to do so would impose an undue hardship.

Q. Should I tell my employer that I have a disability?

A. If you think you will need a reasonable accommodation in order to participate in the application process or to perform essential job functions, you should inform the employer that an accommodation will be needed. Employers are required to provide reasonable accommodation only for the physical or mental limitations of a qualified individual with a disability of which they are aware. Generally, it is the responsibility of the employee to inform the employer that an accommodation is needed.

Q. Do I have to pay for a needed reasonable accommodation?

A. No. The ADA requires that the employer provide the accommodation unless to do so would impose an undue hardship on the operation of the employer's business. If the cost of providing the needed accommodation would be an undue hardship, the employee must be given the choice of providing the accommodation or paying for the portion of the accommodation that causes the undue hardship.

Q. Can an employer lower my salary or pay me less than other employees doing the same job because I need a reasonable accommodation?

A. No. An employer cannot make up the cost of providing a reasonable accommodation by lowering your salary or paying you less than other employees in similar positions.

Q. Does an employer have to make non-work areas used by employees, such as cafeterias, lounges, or employer-provided transportation accessible to people with disabilities?

A. Yes. The requirement to provide reasonable accommodation covers all services, programs, and non-work facilities provided by the employer. If making an existing facility accessible would be an undue hardship, the employer must provide a comparable facility that will enable a person with a disability to enjoy benefits and privileges of employment similar to those enjoyed by other employees, unless to do so would be an undue hardship.

Q. If an employer has several qualified applicants for a job, is the employer required to select a qualified applicant with a disability over other applicants without a disability?

A. No. The ADA does not require that an employer hire an applicant with a disability over other applicants because the person has a disability. The ADA only prohibits discrimination on the basis of disability. It makes it unlawful to refuse to hire a qualified applicant with a disability because he is disabled or because a reasonable accommodation is required to make it possible for this person to perform essential job functions.

Q. Can an employer refuse to hire me because he believes that it would be unsafe, because of my disability, for me to work with certain machinery required to perform the essential functions of the job?

A. The ADA permits an employer to refuse to hire an individual if she poses a direct threat to the health or safety of herself or others. A direct threat means a significant risk of substantial harm. The determination that there is a direct threat must be based on objective, factual evidence regarding an individual's present ability to perform essential functions of a job. An employer cannot refuse to hire you because of a slightly increased risk or because of fears that there might be a significant risk sometime in the future. The employer must also consider whether a risk can be eliminated or reduced to an acceptable level with a reasonable accommodation.

Q. Can an employer offer a health insurance policy that excludes coverage for pre-existing conditions?

A. Yes. The ADA does not affect pre-existing condition clauses contained in health insurance policies even though such clauses may adversely affect employees with disabilities more than other employees.

Q. If the health insurance offered by my employer does not cover all of the medical expenses related to my disability, does the company have to obtain additional coverage for me?

A. No. The ADA only requires that an employer provide employees with disabilities equal access to whatever health insurance coverage is offered to other employees.

Q. I think I was discriminated against because my wife is disabled. Can I file a charge with the EEOC?

A. Yes. The ADA makes it unlawful to discriminate against an individual, whether disabled or not, because of a relationship or association with an individual with a known disability.

Q. Are people with AIDS covered by the ADA?

A. Yes. The legislative history indicates that Congress intended the ADA to protect persons with AIDS and HIV disease from discrimination.

For more specific information about ADA requirements affecting ***employment*** contact:

Equal Employment Opportunity Commission
1801 L Street, NW
Washington, DC 20507
(202) 663-4900 (Voice)
(800) 800-3302 (TDD)
(202) 663-4494 (TDD for 202 Area Code)

For more specific information about ADA requirements affecting ***public accommodations and state and local government services*** contact:

Department of Justice
Office on the Americans with Disabilities Act
Civil Rights Division
P.O. Box 66118
Washington, DC 20035-6118
(202) 514-0301 (Voice)
(202) 514-0381 (TDD)
(202) 514-6193 (Electronic Bulletin Board)

For more specific information about requirements for ***accessible design in new construction and alterations*** contact:

Architectural and Transportation Barriers Compliance Board
1111 18th Street, NW
Suite 501
Washington, DC 20036
800-USA-ABLE
800-USA-ABLE (TDD)

For more specific information about ADA requirements affecting ***transportation*** contact:

Department of Transportation
400 Seventh Street, SW
Washington, DC 20590
(202) 366-9305
(202) 755-7687 (TDD)

For more specific information about ADA requirements for ***telecommunications*** contact:

Federal Communications Commission
1919 M Street, NW
Washington, DC 20554
(202) 632-7260
(202) 632-6999 (TDD)

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This booklet is available in Braille, large print, audiotape and electronic file on computer disk. To obtain accessible formats call EEOC's Office of Equal Employment Opportunity on (202) 663-4395 (voice), (202) 663-4399 (TDD), or write this office at 1801 L Street, N.W., Washington, D.C. 20507.

U.S. Equal Employment Opportunity Commission

The Americans With Disabilities Act

Your Responsibilities as an Employer

Introduction

The Americans with Disabilities Act of 1990 (ADA) makes it unlawful to discriminate in employment against a qualified individual with a disability. The ADA also outlaws discrimination against individuals with disabilities in State and local government services, public accommodations, transportation and telecommunications. This booklet explains the part of the ADA that prohibits job discrimination. This part of the law is enforced by the U.S. Equal Employment Opportunity Commission (EEOC) and State and local civil rights enforcement agencies that work with the Commission.

Are You Covered?

Job discrimination against people with disabilities is illegal if practiced by:

- private employers,
- state and local governments,
- employment agencies,
- labor organizations, and
- labor-management committees.

The part of the ADA enforced by the EEOC outlaws job discrimination by:

- all employers, including state and local government employers, with 25 or more employees after July 26, 1992, and
- all employers, including state and local government employers, with 15 or more employees after July 26, 1994.

Another part of the ADA, enforced by the U.S. Department of Justice (DOJ), prohibits discrimination in state and local government programs and activities, including job discrimination by all state and local governments, regardless of the number of employees, after January 26, 1992.

Because the ADA gives responsibilities to both EEOC and DOJ for employment by state and local governments, these agencies will coordinate the federal enforcement effort. In addition, since some private and governmental employers are already covered by nondiscrimination and affirmative action requirements under the Rehabilitation Act of 1973, EEOC, DOJ, and the Department of Labor also will coordinate the enforcement effort under the ADA and the Rehabilitation Act.

What Employment Practices are Covered?

The ADA makes it unlawful to discriminate in all employment practices such as:

- recruitment
- hiring
- promotion
- training
- lay-off
- pay
- firing
- job assignments
- leave
- benefit
- all other employment related activities.

The ADA prohibits an employer from retaliating against an applicant or employee for asserting his rights under the ADA. The Act also makes it unlawful to discriminate against an applicant or employee, whether disabled or not, because of the individual's family, business, social or other relationship or association with an individual with a disability.

Who Is Protected?

Title I of the ADA protects qualified individuals with disabilities from employment discrimination. Under the ADA, a person has a disability if he has a ***physical or mental impairment*** that ***substantially limits*** a ***major life activity***. The ADA also protects individuals who have a ***record of*** a substantially limiting impairment, and people who are ***regarded as*** having a substantially limiting impairment.

To be protected under the ADA, an individual must have, have a record of, or be regarded as having a ***substantial***, as opposed to a minor, impairment. A substantial impairment is one that significantly limits or restricts a ***major life activity*** such as hearing, seeing, speaking, breathing, performing manual tasks, walking, caring for oneself, learning or working.

An individual with a disability must also be qualified to perform the ***essential functions*** of the job with or without ***reasonable accommoda-***

tion, in order to be protected by the ADA. This means that the applicant or employee must:

- satisfy your job requirements for educational background, employment experience, skills, licenses, and any other qualification standards that are job related; and

- be able to perform those tasks that are essential to the job, with or without reasonable accommodation.

The ADA does not interfere with your right to hire the best qualified applicant. Nor does the ADA impose any affirmative action obligations. The ADA simply prohibits you from discriminating against a qualified applicant or employee because of her disability.

How Are Essential Functions Determined?

Essential functions are the basic job duties that an employee must be able to perform, with or without reasonable accommodation. You should carefully examine each job to determine which functions or tasks are essential to performance. (This is particularly important before taking an employment action such as recruiting, advertising, hiring, promoting or firing).

Factors to consider in determining if a function is essential include:

- whether the reason the position exists is to perform that function,

- the number of other employees available to perform the function or among whom the performance of the function can be distributed, and

- the degree of expertise or skill required to perform the function.

Your judgment as to which functions are essential, and a written job description prepared before advertising or interviewing for a job will be considered by EEOC as evidence of essential functions. Other kinds of evidence that EEOC will consider include:

- actual work experience of present or past employees in the job,
- time spent performing a function,
- consequences of not requiring that an employee perform a function, and
- terms of a collective bargaining agreement.

What Are My Obligations to Provide Reasonable Accommodations?

Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities. For example, reasonable accommodation may include:

- acquiring or modifying equipment or devices,
- job restructuring,
- part-time or modified work schedules,
- reassignment to a vacant position,
- adjusting or modifying examinations, training materials or policies,
- providing readers and interpreters, and
- making the workplace readily accessible to and usable by people with disabilities.

Reasonable accommodation also must be made to enable an individual with a disability to participate in the application process, and

to enjoy benefits and privileges of employment equal to those available to other employees.

It is a violation of the ADA to fail to provide reasonable accommodation to the ***known*** physical or mental limitations of a qualified individual with a disability, unless to do so would impose an undue hardship on the operation of your business. Undue hardship means that the accommodation would require significant difficulty or expense.

What is the Best Way to Identify a Reasonable Accommodation?

Frequently, when a qualified individual with a disability requests a reasonable accommodation, the appropriate accommodation is obvious. The individual may suggest a reasonable accommodation based upon her own life or work experience. However, when the appropriate accommodation is not readily apparent, you must make a reasonable effort to identify one. The best way to do this is to consult informally with the applicant or employee about potential accommodations that would enable the individual to participate in the application process or perform the essential functions of the job. If this consultation does not identify an appropriate accommodation, you may contact the EEOC, state or local vocational rehabilitation agencies, or state or local organizations representing or providing services to individuals with disabilities. Another resource is the Job Accommodation Network (JAN). JAN is a free consultant service that helps employers make individualized accommodations. The telephone number is 1-800-526-7234.

When Does a Reasonable Accommodation Become An Undue Hardship?

It is not necessary to provide a reasonable accommodation if doing so would cause an ***undue hardship***. Undue hardship means that an accommodation would be unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business. Among the factors to be considered in determining whether an

accommodation is an undue hardship are the cost of the accommodation, the employer's size, financial resources and the nature and structure of its operation.

If a particular accommodation would be an undue hardship, you must try to identify another accommodation that will not pose such a hardship. If cost causes the undue hardship, you must also consider whether funding for an accommodation is available from an outside source, such as a vocational rehabilitation agency, and if the cost of providing the accommodation can be offset by state or federal tax credits or deductions. You must also give the applicant or employee with a disability the opportunity to provide the accommodation or pay for the portion of the accommodation that constitutes an undue hardship.

Can I Require Medical Examinations or Ask Questions About an Individual's Disability?

It is unlawful:

- to ask an applicant whether she is disabled or about the nature or severity of a disability, or

- to require the applicant to take a medical examination before making a job offer.

You can ask an applicant questions about ability to perform job-related functions, as long as the questions are not phrased in terms of a disability. You can also ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will perform job-related functions.

After a job offer is made and prior to the commencement of employment duties, you may require that an applicant take a medical examination if everyone who will be working in the job category must also take the examination. You may condition the job offer on the results of the medical examination. However, if an individual is not

hired because a medical examination reveals the existence of a disability, you must be able to show that the reasons for exclusion are job related and necessary for conduct of your business. You also must be able to show that there was no reasonable accommodation that would have made it possible for the individual to perform the essential job functions.

Once you have hired an applicant, you cannot require a medical examination or ask an employee questions about disability unless you can show that these requirements are job related and necessary for the conduct of your business. You may conduct voluntary medical examinations that are part of an employee health program.

The results of all medical examinations or information from inquiries about a disability must be kept confidential, and maintained in separate medical files. You may provide medical information required by state workers' compensation laws to the agencies that administer such laws.

Do Individuals Who Use Drugs Illegally Have Rights Under the ADA?

Anyone who is currently using drugs illegally is not protected by the ADA and may be denied employment or fired on the basis of such use. The ADA does not prevent employers from testing applicants or employees for current illegal drug use, or from making employment decisions based on verifiable results. A test for the illegal use of drugs is not considered a medical examination under the ADA; therefore, it is not a prohibited pre-employment medical examination, and you will not have to show that the administration of the test to employees is job related and consistent with business necessity. The ADA does not encourage, authorize or prohibit drug tests.

How will the ADA Be Enforced and What Are the Available Remedies?

The provisions of the ADA which prohibit job discrimination will be enforced by the U.S. Equal Employment Opportunity Commission. After July 26, 1992, individuals who believe they have been discriminated against on the basis of their disability can file a charge with the Commission at any of its offices located throughout the United States. A charge of discrimination must be filed within 180 days of the discrimination, unless there is a state or local law that also provides relief for the discrimination on the basis of disability. In most cases where there is such a law, the complainant has 300 days to file a charge.

The Commission will investigate and initially attempt to resolve the charge through conciliation, following the same procedures used to handle charges of discrimination filed under Title VII of the Civil Rights Act of 1964. The ADA also incorporates the remedies contained in Title VII. These remedies include hiring, promotion, reinstatement, back pay, and attorney's fees. Reasonable accommodation is also available as a remedy under the ADA.

How Will EEOC Help Employers Who Want to Comply with the ADA?

The Commission believes that employers want to comply with th ADA, and that if they are given sufficient information on how to comply, they will do so voluntarily.

Accordingly, the Commission will conduct an active technical assistance program to promote voluntary compliance with the ADA. This program will be designed to help employers understand their responsibilities and assist people with disabilities to understand their right and the law.

In January 1992, EEOC will publish a Technical Assistance Manual, providing practical application of legal requirements to specif

employment activities, with a directory of resources to aid compliance. EEOC will publish other educational materials, provide training on the law for employers and for people with disabilities, and participate in meetings and training programs of other organizations. EEOC staff also will respond to individual requests for information and assistance. The Commission's technical assistance program will be separate and distinct from its enforcement responsibilities. Employers who seek information or assistance from the Commission will not be subject to any enforcement action because of such inquiries.

The Commission also recognizes that differences and disputes about the ADA requirements may arise between employers and people with disabilities as a result of misunderstandings. Such disputes frequently can be resolved more effectively through informal negotiation or mediation procedures, rather than through the formal enforcement process of the ADA. Accordingly, EEOC will encourage efforts to settle such differences through alternative dispute resolution, providing that such efforts do not deprive any individual of legal rights provided by the statute.

Additional Questions and Answers on the Americans with Disabilities Act

Q. What is the relationship between the ADA and the Rehabilitation Act of 1973?

A. The Rehabilitation Act of 1973 prohibits discrimination on the basis of handicap by the federal government, federal contractors and by recipients of federal financial assistance. If you were covered by the Rehabilitation Act prior to the passage of the ADA, the ADA will not affect that coverage. Many of the provisions contained in the ADA are based on Section 504 of the Rehabilitation Act and its implementing regulations. If you are receiving federal financial assistance and are in compliance with Section 504, you are probably in compliance with the ADA requirements affecting employment except in those areas where

the ADA contains additional requirements. Your nondiscrimination requirements as a federal contractor under Section 503 of the Rehabilitation Act will be essentially the same as those under the ADA; however, you will continue to have additional affirmative action requirements under Section 503 that do not exist under the ADA.

Q. **If I have several qualified applicants for a job, does the ADA require that I hire the applicant with a disability?**

A. No. You may hire the most qualified applicant. The ADA only makes it unlawful for you to discriminate against a qualified individual with a disability on the basis of disability.

Q. **One of my employees is a diabetic, but takes insulin daily to control his diabetes. As a result, the diabetes has no significant impact on his employment. Is he protected by the ADA?**

A. Yes. The determination as to whether a person has a disability under the ADA is made without regard to mitigating measures, such as medications, auxiliary aids and reasonable accommodations. If an individual has an impairment that substantially limits a major life activity, she is protected under the ADA, regardless of the fact that the disease or condition or its effects may be corrected or controlled.

Q. **One of my employees has a broken arm that will heal but is temporarily unable to perform the essential functions of his job as a mechanic. Is this employee protected by the ADA?**

A. No. Although this employee does have an impairment, it does not substantially limit a major life activity if it is of limited duration and will have no long term effect.

Q. **Am I obligated to provide a reasonable accommodation for an individual if I am unaware of her physical or mental impairment?**

A. No. An employer's obligation to provide reasonable accommodation applies only to ***known*** physical or mental limitations. However, this does not mean that an applicant or employee must always inform you of a disability. If a disability is obvious, e.g., the applicant uses a wheelchair, the employer "knows" of the disability even if the applicant never mentions it.

Q. **How do I determine whether a reasonable accommodation is appropriate and the type of accommodation that should be made available?**

A. The requirement generally will be triggered by a request from an individual with a disability, who frequently can suggest an appropriate accommodation. Accommodations must be made on a case-by-case basis, because the nature and extent of a disabling condition and the requirements of the job will vary. The principal test in selecting a particular type of accommodation is that of ***effectiveness***, i.e., whether the accommodation will enable the person with a disability to perform the essential functions of the job. It need not be the best accommodation, or the accommodation the individual with a disability would prefer, although primary consideration should be given to the preference of the individual involved. However, as the employer, you have the discretion to choose between effective accommodations, and you may select one that is least expensive or easier to provide.

Q. **When must I consider reassigning an employee with a disability to another job as a reasonable accommodation?**

A. When an employee with a disability is unable to perform her present job even with the provision of a reasonable accommoda-

tion, you must consider reassigning the employee to an existing position that she can perform with or without a reasonable accommodation. The requirement to consider reassignment applies only to employees and not to applicants. You are not required to create a position or to bump another employee in order to create a vacancy. Nor are you required to promote an employee with a disability to a higher level position.

Q. What if an applicant or employee refuses to accept an accommodation that I offer?

A. The ADA provides that an employer cannot require a qualified individual with a disability to accept an accommodation that is neither requested nor needed by the individual. However, if a necessary reasonable accommodation is refused, the individual may be considered not qualified.

Q. If our business has a fitness room for its employees, must it be accessible to employees with disabilities?

A. Yes. Under the ADA, workers with disabilities must have equal access to all benefits and privileges of employment that are available to similarly situated employees without disabilities. The duty to provide reasonable accommodation applies to all nonwork facilities provided or maintained by you for your employees. This includes cafeterias, lounges, auditoriums, company-provided transportation and counseling services. If making an existing facility accessible would be an undue hardship, you must provide a comparable facility that will enable a person with a disability to enjoy benefits and privileges of employment similar to those enjoyed by other employees, unless this would be an undue hardship.

Q. If I contract for a consulting firm to develop a training course for my employees, and the firm arranges for the course to be held at a hotel that is inaccessible to one of my employees, am I liable under the ADA?

A. Yes. An employer may not do through a contractual or other relationship what it is prohibited from doing directly. You would be required to provide a location that is readily accessible to, and usable by your employee with a disability unless to do so would create an undue hardship.

Q. What are my responsibilities as an employer for making my facilities accessible?

A. As an employer, you are responsible under Title I of the ADA for making facilities accessible to qualified applicants and employees with disabilities as a reasonable accommodation, unless this would cause undue hardship. Accessibility must be provided to enable a qualified applicant to participate in the application process, to enable a qualified individual to perform essential job functions and to enable an employee with a disability to enjoy benefits and privileges available to other employees. However, if your business is a place of public accommodation (such as a restaurant, retail store or bank) you have different obligations to provide accessibility to the general public, under Title III of the ADA. Title III also will require places of public accommodation and commercial facilities (such as office buildings, factories and warehouses) to provide accessibility in new construction or when making alterations to existing structures. Further information on these requirements may be obtained from the U.S. Department of Justice, which enforces Title III. (See page 16).

Q. Under the ADA, can I refuse to hire an individual or fire a current employee who uses drugs illegally?

A. Yes. Individuals who currently use drugs illegally are specifically excluded from the ADA's protections. However, the ADA does not exclude persons who have successfully completed or are currently in a rehabilitation program and are no longer illegally using drugs, and persons erroneously regarded as engaging in the illegal use of drugs.

Q. Does the ADA cover people with AIDS?

A. Yes. The legislative history indicates that Congress intended the ADA to protect persons with AIDS and HIV disease from discrimination.

Q. Can I consider health and safety in deciding whether to hire an applicant or retain an employee with a disability?

A. The ADA permits an employer to require that an individual not pose a direct threat to the health and safety of the individual or others in the work-place. A direct threat means a significant risk of substantial harm. You cannot refuse to hire or fire an individual because of a slightly increased risk of harm to himself or others. Nor can you do so based on a speculative or remote risk. The determination that an individual poses a direct threat must be based on objective, factual evidence regarding the individual's present ability to perform essential job functions. If an applicant or employee with a disability poses a direct threat to the health or safety of himself or others, you must consider whether the risk can be eliminated or reduced to an acceptable level with a reasonable accommodation.

Q. Am I required to provide additional insurance for employees with disabilities?

A. No. The ADA only requires that you provide an employee with a disability equal access to whatever health insurance coverage you provide to other employees. For example, if your health insurance coverage for certain treatments is limited to a specified number per year, and an employee, because of a disability, needs more than the specified number, the ADA does not require that you provide additional coverage to meet that employee's health insurance needs. The ADA also does not require changes in insurance plans that exclude or limit coverage for pre-existing conditions.

Q. Does the ADA require that I post a notice explaining its requirements?

A. The ADA requires that you post a notice in an accessible format to applicants, employees and members of labor organizations, describing the provisions of the Act. EEOC will provide employers with a poster summarizing these and other federal legal requirements for nondiscrimination. EEOC will also provide guidance on making this information available in accessible formats for people with disabilities.

For more specific information about ADA requirements affecting *employment* contact:

Equal Employment Opportunity Commission
1801 L Street, NW
Washington, DC 20507
(202) 663-4900 (Voice)
(800) 800-3302 (TDD)
(202) 663-4494 (TDD for 202 Area Code)

For more specific information about ADA requirements affecting ***public accommodations and state and local government services*** contact:

Department of Justice
Office on the Americans with Disabilities Act
Civil Rights Division
P.O. Box 66118
Washington, DC 20035-6118
(202) 514-0301 (Voice)
(202) 514-0381 (TDD)
(202) 514-6193 (Electronic Bulletin Board)

For more specific information about requirements for ***accessible design in new construction and alterations*** contact:

Architectural and Transportation Barriers Compliance Board
1111 18th Street, NW
Suite 501
Washington, DC 20036
800-USA-ABLE
800-USA-ABLE (TDD)

For more specific information about ADA requirements affecting ***transportation*** contact:

Department of Transportation
400 Seventh Street, SW
Washington, DC 20590
(202) 366-9305
(202) 755-7687 (TDD)

For more specific information about ADA requirements for ***telecommunications*** contact:

Federal Communications Commission
1919 M Street, NW
Washington, DC 20554
(202) 632-7260
(202) 632-6999 (TDD)

For more specific information about federal disability-related ***tax credits and deductions for business*** contact:

Internal Revenue Service
Department of the Treasury
1111 Constitution Avenue, NW
Washington, DC 20044
(202) 566-2000

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This booklet is available in Braille, large print, audiotape and electronic file on computer disk. To obtain accessible formats call the Office of Equal Employment Opportunity on (202) 663-4395 (voice) or (202) 663-4399 (TDD), or write to this office at 1801 L Street, N.W., Washington, D.C. 20507.

federal register

Friday
July 26, 1991

Part V

Equal Employment Opportunity Commission

29 CFR Part 1630
Equal Employment Opportunity for Individuals With Disabilities; Final Rule

29 CFR Parts 1602 and 1627
Recordkeeping and Reporting Under Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act (ADA); Final Rule

35725

Equal Employment Opportunity Commission

29 CFR Part 1630

Equal Employment Opportunity for Individuals With Disabilities

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule.

SUMMARY: On July 26, 1990, the Americans With Disabilities Act (ADA) was signed into law. Section 106 of the ADA requires that the Equal Employment Opportunity Commission (EEOC) issue substantive regulations implementing title I (Employment) within one year of the date of enactment of the Act. Pursuant to this mandate, the Commission is publishing a new part 1630 to its regulations to implement title I and sections 3(2), 3(3), 501, 503, 506(e), 508, 510, and 511 of the ADA as those sections pertain to employment. New part 1630 prohibits discrimination against qualified individuals with disabilities in all aspects of employment.

EFFECTIVE DATE: July 26, 1992.

FOR FURTHER INFORMATION CONTACT: Elizabeth M. Thornton, Deputy Legal Counsel, (202) 663-4638 (voice), (202) 663-7026 (TDD) or Christopher G. Bell, Acting Associate Legal Counsel for Americans With Disabilities Act Services, (202) 663-4679 (voice), (202) 663-7026.

Copies of this final rule and interpretive appendix may be obtained by calling the Office of Communications and Legislative Affairs at (202) 663-4900. Copies in alternate formats may be obtained from the Office of Equal Employment Opportunity by calling (202) 663-4398 or (202) 663-4395 (voice) or (202) 663-4399 (TDD). The alternate formats available are: Large print, braille, electronic file on computer disk, and audio-tape.

SUPPLEMENTARY INFORMATION:

Rulemaking History

The Commission actively solicited and considered public comment in the development of part 1630. On August 1, 1990, the Commission published an advance notice of proposed rulemaking [ANPRM], 55 FR 31192, informing the public that the Commission had begun the process of developing substantive regulations pursuant to title I of the ADA and inviting comment from interested groups and individuals. The comment period ended on August 31, 1990. In response to the ANPRM, the Commission received 138 comments from various disability rights organizations, employer groups, and individuals. Comments were also solicited at 62 ADA input meetings conducted by Commission field offices throughout the country. More than 2400 representatives from disability rights organizations and employer groups participated in these meetings.

On February 28, 1991, the Commission published a notice of proposed rulemaking (NPRM), 56 FR 8578, setting forth proposed part 1630 for public comment. The comment period ended April 29, 1991. In response to the NPRM, the Commission received 697 timely comments from interested groups and individuals. In many instances, a comment was submitted on behalf of several parties and represented the views of numerous groups, employers, or individuals with disabilities. The comments have been analyzed and considered in the development of this final rule.

Overview of Regulations

The format of part 1630 reflects congressional intent, as expressed in the legislative history, that the regulations implementing the employment provisions of the ADA be modeled on the regulations implementing section 504 of the Rehabilitation Act of 1973, as amended, 34 CFR part 104. Accordingly, in developing part 1630, the Commission has been guided by the section 504 regulations and the case law interpreting those regulations.

It is the intent of Congress that the regulations implementing the ADA be comprehensive and easily understood. Part 1630, therefore, defines terms not previously defined in the regulations implementing section 504 of the Rehabilitation Act, such as "substantially limits," "essential functions," and "reasonable accommodation." Of necessity, many of the determinations that may be required by this part must be made on a case-by-case basis. Where possible, part 1630 establishes parameters to serve as guidelines in such inquiries.

The Commission is also issuing interpretive guidance concurrently with the issuance of part 1630 in order to ensure that qualified individuals with disabilities understand their rights under this part and to facilitate and encourage compliance by covered entities. Therefore, part 1630 is accompanied by an appendix. This appendix represents the Commission's interpretation of the issues discussed, and the Commission will be guided by it when resolving charges of employment discrimination. The appendix addresses the major provisions of part 1630 and explains the major concepts of disability rights. Further, the appendix cites to the authority, such as the legislative history of the ADA and case law interpreting section 504 of the Rehabilitation Act, that provides the basis and purpose of the rule and interpretative guidance.

More detailed guidance on specific issues will be forthcoming in the Commission's Compliance Manual. Several Compliance Manual sections and policy guidances on ADA issues are currently under development and are expected to be issued prior to the effective date of the Act. Among the issues to be addressed in depth are the theories of discrimination; definitions of disability and of qualified individual with a disability; reasonable accommodation and undue hardship, including the scope of reassignment; and pre-employment inquiries.

To assist us in the development of this guidance, the Commission requested comment in the NPRM from disability rights organizations, employers, unions, state agencies concerned with employment or workers compensation practices, and interested individuals on specific questions about insurance, workers' compensation, and collective bargaining agreements. Many commenters responded to these questions, and several commenters addressed other matters pertinent to these areas. The Commission has considered these comments in the development of the final rule and will continue to consider them as it develops further ADA guidance.

In the NPRM, the Commission raised questions about a number of insurance-related matters. Specifically, the Commission asked commenters to discuss risk assessment and classification, the relationship between "risk" and "cost," and whether employers should consider the effects that changes in insurance coverage will have on individuals with disabilities before making those changes. Many commenters provided information about insurance practices and explained some of the considerations that affect insurance decisions. In addition, some commenters discussed their experiences with insurance plans and coverage. The commenters presented a wide range of opinions on insurance-related matters, and the Commission will consider the comments as it continues to analyze these complex matters.

The Commission received a large number of comments concerning inquiries about an individual's workers' compensation history. Many employers asserted that such inquiries are job related and consistent with business necessity. Several individuals with disabilities and disability rights

organizations, however, argued that such inquiries are prohibited pre-employment inquiries and are not job related and consistent with business necessity. The Commission has addressed this issue in the interpretive guidance accompanying § 1630.14(a) and will discuss the matter further in future guidance.

There was little controversy about the submission of medical information to workers' compensation offices. A number of employers and employer groups pointed out that the workers' compensation offices of many states request medical information in connection with the administration of second-injury funds. Further, they noted that the disclosure of medical information may be necessary to the defense of a workers' compensation claim. The Commission has responded to these comments by amending the interpretive guidance accompanying § 1630.14(b). This amendment, discussed below, notes that the submission of medical information to workers' compensation offices in accordance with state workers' compensation laws is not inconsistent with § 1630.14(b). The Commission will address this area in greater detail and will discuss other issues concerning workers' compensation matters in future guidances, including the policy guidance on pre-employment inquiries.

With respect to collective bargaining agreements, the Commission asked commenters to discuss the relationship between collective bargaining agreements and such matters as undue hardship, reassignment to a vacant position, the determination of what constitutes a "vacant" position, and the confidentiality requirements of the ADA. The comments that we received reflected a wide variety of views. For example, some commenters argued that it would always be an undue hardship for an employer to provide a reasonable accommodation that conflicted with the provisions of a collective bargaining agreement. Other commenters, however, argued that an accommodation's effect on an agreement should not be considered when assessing undue hardship. Similarly, some commenters stated that the appropriateness of reassignment to a vacant position should depend upon the provisions of a collective bargaining agreement while others asserted that an agreement cannot limit the right to reassignment. Many commenters discussed the relationship between an agreement's seniority provisions and an employer's reasonable accommodation obligations.

In response to comments, the Commission has amended § 1630.2(n)(3) to include "the terms of a collective bargaining agreement" in the types of evidence relevant to determining the essential functions of a position. The Commission has made a corresponding change to the interpretive guidance on § 1630.2(n)(3). In addition, the Commission has amended the interpretive guidance on § 1630.15(d) to note that the terms of a collective bargaining agreement may be relevant to determining whether an accommodation would pose an undue hardship on the operation of a covered entity's business.

The divergent views expressed in the public comments demonstrate the complexity of employment-related issues concerning insurance, workers' compensation, and collective bargaining agreement matters. These highly complex issues require extensive research and analysis and warrant further consideration. Accordingly, the Commission has decided to address the issues in depth in future Compliance Manual sections and policy guidances. The Commission will consider the public comments that it received in response to the NPRM as it develops further guidance on the application of title I of the ADA to these matters.

The Commission has also decided to address burdens-of-proof issues in future guidance documents, including the Compliance Manual section on the theories of discrimination. Many commenters discussed the allocation of the various burdens of proof under title I of the ADA and asked the Commission to clarify those burdens. The comments in this area addressed such matters as determining whether a person is a qualified individual with a disability, job relatedness and business necessity, and undue hardship. The Commission will consider these comments as it prepares further guidance in this area.

A discussion of other significant comments and an explanation of the changes made in part 1630 since publication of the NPRM follows.

Section-by-Section Analysis of Comments and Revisions

Section 1630.1 Purpose, Applicability, and Construction

The Commission has made a technical correction to § 1630.1(a) by adding section 506(e) to the list of statutory provisions implemented by this part. Section 506(e) of the ADA provides that the failure to receive technical assistance from the federal agencies that administer the ADA is not a defense to failing to meet the obligations of title I.

Some commenters asked the Commission to note that the ADA does not preempt state claims, such as state tort claims, that confer greater remedies than are available under the ADA. The Commission has added a paragraph to that effect in the appendix discussion of §§ 1630.1 (b) and (c). This interpretation is consistent with the legislative history of the Act. See H.R. Rep. No. 485 part 3, 101st Cong., 2d Sess. 69–70 (1990) (hereinafter referred to as House Judiciary Report).

In addition, the Commission has made a technical amendment to the appendix discussion to note that the ADA does not automatically preempt medical standards or safety requirements established by Federal law or regulations. The Commission has also amended the discussion to refer to a direct threat that cannot be eliminated "or reduced" through reasonable accommodation. This language is consistent with the regulatory definition of direct threat. (See § 1630.2(r), below.)

Section 1630.2 Definitions

Section 1630.2(h) Physical or Mental Impairment

The Commission has amended the interpretive guidance accompanying § 1630.2(h) to note that the definition of the term "impairment" does not include characteristic predisposition to illness or disease.

In addition, the Commission has specifically noted in the interpretive guidance that pregnancy is not an impairment. This change responds to the numerous questions that the Commission has received concerning whether pregnancy is a disability covered by the ADA. Pregnancy, by itself, is not an impairment and is therefore not a disability.

Section 1630.2(j) Substantially Limits

The Commission has revised the interpretive guidance accompanying § 1630.2(j) to make clear that the determination of whether an impairment substantially limits one or more major life activities is to be made without regard to the availability of medicines, assistive devices, or other mitigating measures. This interpretation is consistent with the legislative history of the ADA. See S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989) (hereinafter referred to as Senate Report); H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess. 52 (1990) (hereinafter referred to as House Labor Report); House Judiciary Report at 28. The Commission has also revised the examples in the third paragraph of this

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section's guidance. The examples now focus on the individual's capacity to perform major life activities rather than on the presence or absence of mitigating measures. These revisions respond to comments from disability rights groups, which were concerned that the discussion could be misconstrued to exclude from ADA coverage individuals with disabilities who function well because of assistive devices or other mitigating measures.

In an amendment to the paragraph concerning the factors to consider when determining whether an impairment is substantially limiting, the Commission has provided a second example of an impairment's "impact." This example notes that a traumatic head injury's affect on cognitive functions is the "impact" of that impairment.

Many commenters addressed the provisions concerning the definition of "substantially limits" with respect to the major life activity of working (§ 1630.2(j)(3)). Some employers generally supported the definition but argued that it should be applied narrowly. Other employers argued that the definition is too broad. Disability rights groups and individuals with disabilities, on the other hand, argued that the definition is too narrow, unduly limits coverage, and places an onerous burden on individuals seeking to establish that they are covered by the ADA. The Commission has responded to these comments by making a number of clarifications in this area.

The Commission has revised § 1630.2(j)(3)(ii) and the accompanying interpretive guidance to note that the listed factors "may" be considered when determining whether an individual is substantially limited in working. This revision clarifies that the factors are relevant to, but are not required elements of, a showing of a substantial limitation in working.

Disability rights groups asked the Commission to clarify that "substantially limited in working" applies only when an individual is not substantially limited in any other major life activity. In addition, several other commenters indicated confusion about whether and when the ability to work should be considered when assessing if an individual has a disability. In response to these comments, the Commission has amended the interpretive guidance by adding a new paragraph clarifying the circumstances under which one should determine whether an individual is substantially limited in the major life activity of working. This paragraph makes clear that a determination of whether an individual is substantially limited in the ability to work should be made only when the individual is not disabled in any other major life activity. Thus, individuals need not establish that they are substantially limited in working if they already have established that they are, have a record of, or are regarded as being substantially limited in another major life activity.

The proposed interpretive guidance in this area provided an example concerning a surgeon with a slight hand impairment. Several commenters expressed concern about this example. Many of these comments indicated that the example confused, rather than clarified, the matter. The Commission, therefore, has deleted this example. To explain further the application of the "substantially limited in working" concept, the Commission has provided another example (concerning a commercial airline pilot) in the interpretive guidance.

In addition, the Commission has clarified that the terms "numbers and types of jobs" (see § 1630.2(j)(3)(ii)(B)) and "numbers and types of other jobs" (see § 1630.2(j)(3)(ii)(C)) do not require an onerous evidentiary showing.

In the proposed Appendix, after the interpretive guidance accompanying § 1630.2(l), the Commission included a discussion entitled "Frequently Disabling Impairments." Many commenters expressed concern about this discussion. In response to these comments, and to avoid confusion, the Commission has revised the discussion and has deleted the list of frequently disabling impairments. The revised discussion now appears in the interpretive guidance accompanying § 1630.2(j).

Section 1630.2(l) In Regarded as Having Such an Impairment

Section 1630.2(l)(3) has been changed to refer to "a substantially limiting impairment" rather than "such an impairment." This change clarifies that an individual meets the definition of the term "disability" when a covered entity treats the individual as having a substantially limiting impairment. That is, § 1630.2(l)(3) refers to any substantially limiting impairment, rather than just to one of the impairments described in §§ 1630.2(l) (1) or (2).

The proposed interpretive guidance on § 1630.2(l) stated that, when determining whether an individual is regarded as substantially limited in working, "it should be assumed that all similar employers would apply the same exclusionary qualification standard that the employer charged with discrimination has used." The Commission specifically requested comment on this proposal, and many commenters addressed this issue. The Commission has decided to eliminate this assumption and to revise the interpretive guidance. The guidance now explains that an individual meets the "regarded as" part of the definition of disability if he or she can show that a covered entity made an employment decision because of a perception of a disability based on "myth, fear, or stereotype." This is consistent with the legislative history of the ADA. See House Judiciary Report at 30.

Section 1630.2(m) Qualified Individual With a Disability

Under the proposed part 1630, the first step in determining whether an individual with a disability is a qualified individual with a disability was to determine whether the individual "satisfies the requisite skill, experience and education requirements of the employment position" the individual holds or desires. Many employers and employer groups asserted that the proposed regulation unduly limited job prerequisites to skill, experience, and education requirements and did not permit employers to consider other job-related qualifications. To clarify that the reference to skill, experience, and education requirements was not intended to be an exhaustive list of permissible qualification requirements, the Commission has revised the phrase to include "skill, experience, education, and other job-related requirements." This revision recognizes that other types of job-related requirements may be relevant to determining whether an individual is qualified for a position.

Many individuals with disabilities and disability rights groups asked the Commission to emphasize that the determination of whether a person is a qualified individual with a disability must be made at the time of the employment action in question and cannot be based on speculation that the individual will become unable to perform the job in the future or may cause increased health insurance or workers' compensation costs. The Commission has amended the interpretive guidance on § 1630.2(m) to reflect this point. This guidance is consistent with the legislative history of the Act. See Senate Report at 28, House Labor Report at 55, 136, House Judiciary Report at 34, 71.

Section 1630.2(n) Essential Functions

Many employers and employer groups objected to the use of the terms "primary" and "intrinsic" in the definition of essential functions. To

avoid confusion about the meanings of "primary" and "intrinsic," the Commission has deleted these terms from the definition. The final regulation defines essential functions as "fundamental job duties" and notes that essential functions do not include the marginal functions of a position.

The proposed interpretive guidance accompanying § 1630.2(n)(2)(ii) noted that one of the factors in determining whether a function is essential is the number of employees available to perform a job function or among whom the performance of that function can be distributed. The proposed guidance explained that "[t]his may be a factor either because the total number of employees is low, or because of the fluctuating demands of the business operations." Some employers and employer groups expressed concern that this language could be interpreted as requiring an assessment of whether a job function could be distributed among all employees in any job at any level. The Commission has amended the interpretive guidance on this factor to clarify that the factor refers only to distribution among "available" employees.

Section 1630.2(n)(3) lists several kinds of evidence that are relevant to determining whether a particular job function is essential. Some employers and unions asked the Commission to recognize that collective bargaining agreements may help to identify a position's essential functions. In response to these comments, the Commission has added "[t]he terms of a collective bargaining agreement" to the list. In addition, the Commission has amended the interpretive guidance to note specifically that this type of evidence is relevant to the determination of essential functions. This addition is consistent with the legislative history of the Act. See Senate Report at 32; House Labor Report at 63.

Proposed § 1630.2(n)(3) referred to the evidence on the list as evidence "that may be considered in determining whether a particular function is essential." The Commission has revised this section to refer to evidence "of" whether a particular function is essential. The Commission made this revision in response to concerns about the meaning of the phrase "may be considered." In that regard, some commenters questioned whether the phrase meant that some of the listed evidence might not be considered when determining whether a function is essential to a position. This revision clarifies that all of the types of evidence on the list, when available, are relevant to the determination of a position's essential functions. As the final rule and interpretive guidance make clear, the list is not an exhaustive list of all types of relevant evidence. Other types of available evidence may also be relevant to the determination.

The Commission has amended the interpretive guidance concerning § 1630.2(n)(3)(ii) to make clear that covered entities are not required to develop and maintain written job descriptions. Such job descriptions are relevant to a determination of a position's essential functions, but they are not required by part 1630.

Several commenters suggested that the Commission establish a rebuttable presumption in favor of the employer's judgment concerning what functions are essential. The Commission has not done so. On that point, the Commission notes that the House Committee on the Judiciary specifically rejected an amendment that would have created such a presumption. See House Judiciary Report at 33–34.

The last paragraph of the interpretive guidance on § 1630.2(n) notes that the inquiry into what constitutes a position's essential functions is not intended to second guess an employer's business judgment regarding production standards, whether qualitative or quantitative. In response to several comments, the Commission has revised this paragraph to incorporate examples of qualitative production standards.

Section 1630.2(o) Reasonable Accommodation

The Commission has deleted the reference to undue hardship from the definition of reasonable accommodation. This is a technical change reflecting that undue hardship is a defense to, rather than an aspect of, reasonable accommodation. As some commenters have noted, a defense to a term should not be part of the term's definition. Accordingly, we have separated the concept of undue hardship from the definition of reasonable accommodation. This change does not affect the obligations of employers or the rights of individuals with disabilities. Accordingly, a covered entity remains obligated to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability unless to do so would impose an undue hardship on the operation of the covered entity's business. See § 1630.9.

With respect to § 1630.2(o)(1)(i), some commenters expressed confusion about the use of the phrase "qualified individual with a disability." In that regard, they noted that the phrase has a specific definition under this part (see § 1630.2(m)) and questioned whether an individual must meet that definition to request an accommodation with regard to the application process. The Commission has substituted the phrase "qualified applicant with a disability" for "qualified individual with a disability." This change clarifies that an individual with a disability who requests a reasonable accommodation to participate in the application process must be eligible only with respect to the application process.

The Commission has modified § 1630.2(o)(1)(iii) to state that reasonable accommodation includes modifications or adjustments that enable employees with disabilities to enjoy benefits and privileges that are "equal" to (rather than "the same" as) the benefits and privileges that are enjoyed by other employees. This change clarifies that such modifications or adjustments must ensure that individuals with disabilities receive equal access to the benefits and privileges afforded to other employees but may not be able to ensure that the individuals receive the same results of those benefits and privileges or precisely the same benefits and privileges.

Many commenters discussed whether the provision of daily attendant care is a form of reasonable accommodation. Employers and employer groups asserted that reasonable accommodation does not include such assistance. Disability rights groups and individuals with disabilities, however, asserted that such assistance is a form of reasonable accommodation but that this part did not make that clear. To clarify the extent of the reasonable accommodation obligation with respect to daily attendant care, the Commission has amended the interpretive guidance on § 1630.2(o) to make clear that it may be a reasonable accommodation to provide personal assistants to help with specified duties related to the job.

The Commission also has amended the interpretive guidance to note that allowing an individual with a disability to provide and use equipment, aids, or services that an employer is not required to provide may also be a form of reasonable accommodation. Some individuals with disabilities and disability rights groups asked the Commission to make this clear.

The interpretive guidance points out that reasonable accommodation may include making non-work areas accessible to individuals with disabilities. Many commenters asked

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the Commission to include rest rooms in the examples of accessible areas that may be required as reasonable accommodations. In response to those comments, the Commission has added rest rooms to the examples.

In response to other comments, the Commission has added a paragraph to the guidance concerning job restructuring as a form of reasonable accommodation. The new paragraph notes that job restructuring may involve changing when or how an essential function is performed.

Several commenters asked the Commission to provide additional guidance concerning the reasonable accommodation of reassignment to a vacant position. Specifically, commenters asked the Commission to clarify how long an employer must wait for a vacancy to arise when considering reassignment and to explain whether the employer is required to maintain the salary of an individual who is reassigned from a higher-paying position to a lower-paying one. The Commission has amended the discussion of reassignment to refer to reassignment to a position that is vacant "within a reasonable amount of time * * *" in light of the totality of the circumstances." In addition, the Commission has noted that an employer is not required to maintain the salaries of reassigned individuals with disabilities if it does not maintain the salaries of individuals who are not disabled.

Section 1630.2(p) Undue Hardship

The Commission has substituted "facility" or "facilities" for "site," or "sites" in § 1630.2(p)(2) and has deleted the definition of the term "site" Many employers and employer groups expressed concern about the use and meaning of the term "site." The final regulation's use of the terms "facility" and "facilities" is consistent with the language of the statute.

The Commission has amended the last paragraph of the interpretive guidance accompanying § 1630.2(p) to note that, when the cost of a requested accommodation would result in an undue hardship and outside funding is not available, an individual with a disability should be given the option of paying the portion of the cost that constitutes an undue hardship. This amendment is consistent with the legislative history of the Act. See Senate Report at 36; House Labor Report at 69.

Several employers and employer groups asked the Commission to expand the list of factors to be considered when determining if an accommodation would impose an undue hardship on a covered entity by adding another factor: The relationship of an accommodation's cost to the value of the position at issue, as measured by the compensation paid to the holder of the position. Congress, however, specifically rejected this type of factor. See House Judiciary Report at 41 (noting that the House Judiciary Committee rejected an amendment proposing that an accommodation costing more than ten percent of the employee's salary be treated as an undue hardship). The Commission, therefore, has not added this to the list.

Section 1630.2(q) Qualification Standards

The Commission has deleted the reference to direct threat from the definition of qualification standards. This revision is consistent with the revisions the Commission has made to §§ 1630.10 and 1630.15(b). (See discussion below.)

Section 1630.2(r) Direct Threat

Many disability rights groups and individuals with disabilities asserted that the definition of direct threat should not include a reference to the health or safety of the individual with a disability. They expressed concern that the reference to "risk to self" would result in direct threat determinations that are based on negative stereotypes and paternalistic views about what is best for individuals with disabilities. Alternatively, the commenters asked the Commission to clarify that any assessment of risk must be based on the individual's present condition and not on speculation about the individual's future condition. They also asked the Commission to specify evidence other than medical knowledge that may be relevant to the determination of direct threat.

The final regulation retains the reference to the health or safety of the individual with a disability. As the appendix notes, this is consistent with the legislative history of the ADA and the case law interpreting section 504 of the Rehabilitation Act.

To clarify the direct threat standard, the Commission has made four revisions to § 1630.2(r). First, the Commission has amended the first sentence of the definition of direct threat to refer to a significant risk of substantial harm that cannot be eliminated "or reduced" by reasonable accommodation. This amendment clarifies that the risk need not be eliminated entirely to fall below the direct threat definition; instead, the risk need only be reduced to the level at which there no longer exists a significant risk of substantial harm. In addition, the Commission has rephrased the second sentence of § 1630.2(r) to clarify that an employer's direct threat standard must apply to all individuals, not just to individuals with disabilities. Further, the Commission has made clear that a direct threat determination must be based on "an individualized assessment of the individual's present ability to safely perform the essential functions of the job." This clarifies that a determination that employment of an individual would pose a direct threat must involve an individualized inquiry and must be based on the individual's current condition. In addition, the Commission has added "the imminence of the potential harm" to the list of factors to be considered when determining whether employment of an incividual would pose a direct threat. This change clarifies that both the probability of harm and the imminence of harm are relevant to direct threat determinations. This definition of direct threat is consistent with the legislative history of the Act. See Senate Report at 27, House Labor Report at 56–57, 73–75, House Judiciary Report at 45–46.

Further, the Commission has amended the interpretive guidance on § 1630.2(r) to highlight the individualized nature of the direct threat assessment. In addition, the Commission has cited examples of evidence other than medical knowledge that may be relevant to determining whether employment of an individual would pose a direct threat.

Section 1630.3 Exceptions to the Definitions of "Disability" and "Qualified Individual With a Disability"

Many commenters asked the Commission to clarify that the term "rehabilitation program" includes self-help groups. In response to these comments, the Commission has amended the interpretive guidance in this area to include a reference to professionally recognized self-help programs.

The Commission has added a paragraph to the guidance on § 1630.3 to note that individuals who are not excluded under this provision from the definitions of the terms "disability" and "qualified individual with a disability" must still establish that they meet those definitions to be protected by part 1630. Several employers and employer groups asked the Commission to clarify that individuals are not automatically covered by the ADA simply because they do not fall into one of the exclusions listed in this section.

The proposed interpretive gui. § 1630.3 noted that employers a entitled to seek reasonable assu that an individual is not currently

engaging in the illegal use of drugs. In that regard, the guidance stated, "It is essential that the individual offer evidence, such as a drug test, to prove that he or she is not currently engaging" in such use. Many commenters interpreted this guidance to require individuals to come forward with evidence even in the absence of a request by the employer. The Commission has revised the interpretive guidance to clarify that such evidence is required only upon request.

Section 1630.6 Contractual or Other Arrangements

The Commission has added a sentence to the first paragraph of the interpretive guidance on § 1630.6 to clarify that this section has no impact on whether one is a covered entity or employer as defined by § 1630.2.

The proposed interpretive guidance on contractual or other relationships noted that § 1630.6 applied to parties on either side of the relationship. To illustrate this point, the guidance stated that "a copier company would be required to ensure the provision of any reasonable accommodation necessary to enable its copier service representative with a disability to service a client's machine." Several employers objected to this example. In that respect, the commenters argued that the language of the example was too broad and could be interpreted as requiring employers to make all customers premises accessible. The Commission has revised this example to provide a clearer, more concrete indication of the scope of the reasonable accommodation obligations in this area.

In addition, the Commission has clarified the interpretive guidance by noting that the existence of a contractual relationship adds no new obligations "under this part."

Section 1630.8 Relationship or Association With an Individual With a Disability

The Commission has added the phrase "or otherwise discriminate against" to § 1630.8. This change clarifies that harassment or any other form of discrimination against a qualified individual because of the known disability of a person with whom the individual has a relationship or an association is also a prohibited form of discrimination.

The Commission has revised the first sentence of the interpretive guidance to refer to a person's relationship or association with an individual who has a "known" disability. This revision makes the language of the interpretive guidance consistent with the language of the regulation. In addition, to reflect current, preferred terminology, the Commission has substituted the term "people who have AIDS" for the term "AIDS patients." Finally, the Commission has added a paragraph to clarify that this provision applies to discrimination in other employment privileges and benefits, such as health insurance benefits.

Section 1630.9 Not Making Reasonable Accommodation

Section 1630.9(c) provides that "[a] covered entity shall not be excused from the requirements of this part because of any failure to receive technical assistance * * *." Some employers asked the Commission to revise this section and to state that the failure to receive technical assistance is a defense to not providing reasonable accommodation. The Commission has not made the requested revision. Section 1630.9(c) is consistent with section 506(e) of the ADA, which states that the failure to receive technical assistance from the federal agencies that administer the ADA does not excuse a covered entity from compliance with the requirements of the Act.

The first paragraph of the interpretive guidance accompanying § 1630.9 notes that the reasonable accommodation obligation does not require employers to provide adjustments or modifications that are primarily for the personal use of the individual with a disability. The Commission has amended this guidance to clarify that employers may be required to provide items that are customarily personal-use items where the items are specifically designed or required to meet job-related needs.

In addition, the Commission has amended the interpretive guidance to clarify that there must be a nexus between an individual's disability and the need for accommodation. Thus, the guidance notes that an individual with a disability is "otherwise qualified" if he or she is qualified for the job except that, "because of the disability," the individual needs reasonable accommodation to perform the essential functions of the job. Similarly, the guidance notes that employers are required to accommodate only the physical or mental limitations "resulting from the disability" that are known to the employer.

In response to commenters' requests for clarification, the Commission has noted that employers may require individuals with disabilities to provide documentation of the need for reasonable accommodation when the need for a requested accommodation is not obvious.

In addition, the Commission has amended the last paragraph of the interpretive guidance on the "Process of Determining the Appropriate Reasonable Accommodation." This amendment clarifies that an employer must consider allowing an individual with a disability to provide his or her own accommodation if the individual wishes to do so. The employer, however, may not require the individual to provide the accommodation.

Section 1630.10 Qualification Standards, Tests, and Other Selection Criteria

The Commission has added the phrase "on the basis of disability" to § 1630.10(a) to clarify that a selection criterion that is not job related and consistent with business necessity violates this section only when it screens out an individual with a disability (or a class of individuals with disabilities) on the basis of disability. That is, there must be a nexus between the exclusion and the disability. A selection criterion that screens out an individual with a disability for reasons that are not related to the disability does not violate this section. The Commission has made similar changes to the interpretive guidance on this section.

Proposed § 1630.10(b) stated that a covered entity could use as a qualification standard the requirement that an individual not pose a direct threat to the health or safety of the individual or others. Many individuals with disabilities objected to the inclusion of the direct threat reference in this section and asked the Commission to clarify that the direct threat standard must be raised by the covered entity as a defense. In that regard, they specifically asked the Commission to move the direct threat provision from § 1630.10 (qualification standards) to § 1630.15 (defenses). The Commission has deleted the direct threat provision from § 1630.10 and has moved it to § 1630.15. This is consistent with section 103 of the ADA, which refers to defenses and states (in section 103(b)) that the term "qualification standards" may include a requirement that an individual not pose a direct threat.

Section 1630.11 Administration of Tests

The Commission has revised the interpretive guidance concerning § 1630.11 to clarify that a request for an alternative test format or other testing accommodation generally should be made prior to the administration of the test or as soon as the individual with a

disability becomes aware of the need for accommodation. In addition, the Commission has amended the last paragraph of the guidance on this section to note that an employer can require a written test of an applicant with dyslexia if the ability to read is "the skill the test is designed to measure." This language is consistent with the regulatory language, which refers to the skills a test purports to measure.

Some commenters noted that certain tests are designed to measure the speed with which an applicant performs a function. In response to these comments, the Commission has amended the interpretive guidance to state that an employer may require an applicant to complete a test within a specified time frame if speed is one of the skills being tested.

In response to comments, the Commission has amended the interpretive guidance accompanying § 1630.14(a) to clarify that employers may invite applicants to request accommodations for taking tests. (See § 1630.14(a), below.)

Section 1630.12 Retaliation and Coercion

The Commission has amended § 1630.12 to clarify that this section also prohibits harassment.

Section 1630.13 Prohibited Medical Examinations and Inquiries

In response to the Commission's request for comment on certain workers' compensation matters, many commenters addressed whether a covered entity may ask applicants about their history of workers' compensation claims. Many employers and employer groups argued that an inquiry about an individual's workers' compensation history is job related and consistent with business necessity. Disability rights groups and individuals with disabilities, however, asserted that such an inquiry could disclose the existence of a disability. In response to comments and to clarify this matter, the Commission has amended the interpretive guidance accompanying § 1630.13(a). The amendment states that an employer may not inquire about an individual's workers' compensation history at the pre-offer stage.

The Commission has made a technical change to § 1630.13(b) by deleting the phrase "unless the examination or inquiry is shown to be job-related and consistent with business necessity" from the section. This change does not affect the substantive provisions of § 1630.13(b). The Commission has incorporated the job-relatedness and business-necessity requirement into a new § 1630.14(c), which clarifies the scope of permissible examinations or inquiries of employees. (See § 1630.14(c), below.)

Section 1630.14 Medical Examinations and Inquiries Specifically Permitted

Section 1630.14(a) Acceptable Pre-employment Inquiry

Proposed § 1630.14(a) stated that a covered entity may make pre-employment inquiries into an applicant's ability to perform job-related functions. The interpretive guidance accompanying this section noted that an employer may ask an individual whether he or she can perform a job function with or without reasonable accommodation.

Many employers asked the Commission to provide additional guidance in this area. Specifically, the commenters asked whether an employer may ask how an individual will perform a job function when the individual's known disability appears to interfere with or prevent performance of job-related functions. To clarify this matter, the Commission has amended § 1630.14(a) to state that a covered entity "may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions." The Commission has amended the interpretive guidance accompanying § 1630.14(a) to reflect this change.

Many commenters asked the Commission to state that employers may inquire, before tests are taken, whether candidates will require any reasonable accommodations to take the tests. They asked the Commission to acknowledge that such inquiries constitute permissible pre-employment inquiries. In response to these comments, the Commission has added a new paragraph to the interpretive guidance on § 1630.14(a). This paragraph clarifies that employers may ask candidates to inform them of the need for reasonable accommodation within a reasonable time before the administration of the test and may request documentation verifying the need for accommodation.

The Commission has received many comments from law enforcement and other public safety agencies concerning the administration of physical agility tests. In response to those comments, the Commission has added a new paragraph clarifying that such tests are not medical examinations.

Many employers and employer groups have asked the Commission to discuss whether employers may invite applicants to self-identify as individuals with disabilities. In that regard, many of the commenters noted that section 503 of the Rehabilitation Act imposes certain obligations on government contractors. The interpretive guidance accompanying § 1630.1(b) and (c) notes that "title I of the ADA would not be a defense to failing to collect information required to satisfy the affirmative action requirements of section 503 of the Rehabilitation Act." To reiterate this point, the Commission has amended the interpretive guidance accompanying § 1630.14(a) to note specifically that this section does not restrict employers from collecting information and inviting individuals to identify themselves as individuals with disabilities as required to satisfy the affirmative action requirements of section 503 of the Rehabilitation Act.

Section 1630.14(b) Employment Entrance Examinations

Section 1630.14(b) has been amended to include the phrase "[and/or inquiry]" after references to medical examinations. Some commenters were concerned that the regulation as drafted prohibited covered entities from making any medical inquiries or administering questionnaires that did not constitute examinations. This change clarifies that the term "employment entrance examinations" includes medical inquiries as well as medical examinations.

Section 1630.14(b)(2) has been revised to state that the results of employment entrance examinations "shall not be used for any purpose inconsistent with this part." This language is consistent with the language used in § 1630.14(c)(2).

The second paragraph of the proposed interpretive guidance on this section referred to "relevant" physical and psychological criteria. Some commenters questioned the use of the term "relevant" and expressed concern about its meaning. The Commission has deleted this term from the paragraph.

Many commenters addressed the confidentiality provisions of this section. They noted that it may be necessary to disclose medical information in defense of workers' compensation claims or during the course of other legal proceedings. In addition, they pointed out that the workers' compensation offices of many states request such information for the administration of second-injury funds or for other administrative purposes.

The Commission has revised the last paragraph of the interpretive guidance on § 1630.14(b) to reflect that the information obtained during a permitted employment entrance examination or

inquiry may be used only "in a manner not inconsistent with this part." In addition, the Commission has added language clarifying that it is permissible to submit the information to state workers' compensation offices.

Several commenters asked the Commission to clarify whether information obtained from employment entrance examinations and inquiries may be used for insurance purposes. In response to these comments, the Commission has noted in the interpretive guidance that such information may be used for insurance purposes described in § 1630.16(f).

Section 1630.14(c) Examination of Employees

The Commission has added a new § 1630.14(c), Examination of employees, that clarifies the scope of permissible medical examinations and inquiries. Several employers and employer groups expressed concern that the proposed version of part 1630 did not make it clear that covered entities may require employee medical examinations, such as fitness-for-duty examinations, that are job related and consistent with business necessity. New § 1630.14(c) clarifies this by expressly permitting covered entities to require employee medical examinations and inquiries that are job related and consistent with business necessity. The information obtained from such examinations or inquiries must be treated as a confidential medical record. This section also incorporates the last sentence of proposed § 1630.14(c). The remainder of proposed § 1630.14(c) has become § 1630.14(d).

To comport with this technical change in the regulation, the Commission has made corresponding changes in the interpretive guidance. Thus, the Commission has moved the second paragraph of the proposed guidance on § 1630.13(b) to the guidance on § 1630.14(c). In addition, the Commission has reworded the paragraph to note that this provision permits (rather than does not prohibit) certain medical examinations and inquiries.

Some commenters asked the Commission to clarify whether employers may make inquiries or require medical examinations in connection with the reasonable accommodation process. The Commission has noted in the interpretive guidance that such inquiries and examinations are permissible when they are necessary to the reasonable accommodation process described in this part.

Section 1630.15 Defenses

The Commission has added a sentence to the interpretive guidance on § 1630.15(a) to clarify that the assertion that an insurance plan does not cover an individual's disability or that the disability would cause increased insurance or workers' compensation costs does not constitute a legitimate, nondiscriminatory reason for disparate treatment of an individual with a disability. This clarification, made in response to many comments from individuals with disabilities and disability rights groups, is consistent with the legislative history of the ADA. See Senate Report at 65; House Labor Report at 136; House Judiciary Report at 71.

The Commission has amended § 1630.15(b) by stating that the term "qualification standard" may include a requirement that an individual not pose a direct threat. As noted above, this is consistent with section 103 of the ADA and responds to many comments from individuals with disabilities.

The Commission has made a technical correction to § 1630.15(c) by changing the phrase "an individual or class of individuals with disabilities" to "an individual with a disability or a class of individuals with disabilities."

Several employers and employer groups asked the Commission to acknowledge that undue hardship considerations about reasonable accommodations at temporary work sites may be different from the considerations relevant to permanent work sites. In response to these comments, the Commission has amended the interpretive guidance on § 1630.15(d) to note that an accommodation that poses an undue hardship in a particular job setting, such as a temporary construction site, may not pose an undue hardship in another setting. This guidance is consistent with the legislative history of the ADA. See House Labor Report at 69–70; House Judiciary Report at 41–42.

The Commission also has amended the interpretive guidance to note that the terms of a collective bargaining agreement may be relevant to the determination of whether a requested accommodation would pose an undue hardship on the operation of a covered entity's business. This amendment, which responds to commenters' requests that the Commission recognize the relevancy of collective bargaining agreements, is consistent with the legislative history of the Act. See Senate Report at 32; House Labor Report at 63.

Section 1630.2(p)(2)(v) provides that the impact of an accommodation on the ability of other employees to perform their duties is one of the factors to be considered when determining whether the accommodation would impose an undue hardship on a covered entity. Many commenters addressed whether an accommodation's impact on the morale of other employees may be relevant to a determination of undue hardship. Some employers and employer groups asserted that a negative impact on employee morale should be considered an undue hardship. Disability rights groups and individuals with disabilities, however, argued that undue hardship determinations must not be based on the morale of other employees. It is the Commission's view that a negative effect on morale, by itself, is not sufficient to meet the undue hardship standard. Accordingly, the Commission has noted in the guidance on § 1630.15(d) that an employer cannot establish undue hardship by showing only that an accommodation would have a negative impact on employee morale.

Section 1630.16 Specific Activities Permitted

The Commission has revised the second sentence of the interpretive guidance on § 1630.16(b) to state that an employer may hold individuals with alcoholism and individuals who engage in the illegal use of drugs to the same performance and conduct standards to which it holds "all of its" other employees. In addition, the Commission has deleted the term "otherwise" from the third sentence of the guidance. These revisions clarify that employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and nondisabled, to the same performance and conduct standards.

Many commenters asked the Commission to clarify that the drug testing provisions of § 1630.16(c) pertain only to tests to determine the illegal use of drugs. Accordingly, the Commission has amended § 1630.16(c)(1) to refer to the administration of "such" drug tests and § 1630.16(c)(3) to refer to information obtained from a "test to determine the illegal use of drugs." We have also made a change in the grammatical structure of the last sentence of § 1630.16(c)(1). We have made similar changes to the corresponding section of the interpretive guidance. In addition, the Commission has amended the interpretive guidance to state that such tests are neither encouraged, "authorized," nor prohibited. This amendment conforms the language of the guidance to the language of § 1630.16(c)(1).

The Commission has revised § 1630.16(e)(1) to refer to communicable diseases that "are" (rather than "may be") transmitted through the handling of food. Several commenters asked the Commission to make this technical change, which adopts the statutory language.

Several commenters also asked the Commission to conform the language of proposed § 1630.16(f) (1) and (2) to the language of sections 501(c) (1) and (2) of the Act. The Commission has made this change. Thus, § 1630.16(f) (1) and (2) now refer to risks that are "not inconsistent with State law."

Executive Order 12291 and Regulatory Flexibility Act

The Commission published a Preliminary Regulatory Impact Analysis on February 28, 1991 (56 FR 8578). Based on the Preliminary Regulatory Impact Analysis, the Commission certifies that this final rule will not have a significant economic impact on a substantial number of small business entities. The Commission is issuing this final rule at this time in the absence of a Final Regulatory Impact Analysis in order to meet the statutory deadline. The Commission's Preliminary Regulatory Impact Analysis was based upon existing data on the costs of reasonable accommodation. The Commission received few comments on this aspect of its rulemaking. Because of the complexity inherent in assessing the economic costs and benefits of this rule and the relative paucity of data on this issue, the Commission will further study the economic impact of the regulation and intends to issue a Final Regulatory Impact Analysis prior to January 1, 1992. As indicated above, the Preliminary Regulatory Impact Analysis was published on February 28, 1991 (56 FR 8578) for comment. The Commission will also provide a copy to the public upon request by calling the Commission's Office of Communications and Legislative Affairs at (202) 663–4900. Commenters are urged to provide additional information as to the costs and benefits associated with this rule. This will further facilitate the development of a Final Regulatory Impact Analysis. Comments must be received by September 28, 1991. Written comments should be submitted to Frances M. Hart, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 1801 "L" Street, NW., Washington, DC 20507.

As a convenience to commenters, the Executive Secretariat will accept public comments transmitted by facsimile ("FAX") machine. The telephone number of the FAX receiver is (202) 663–4114. (This is not a toll-free number). Only public comments of six or fewer pages will be accepted via FAX transmittal. This limitation is necessary in order to assure access to the equipment. Comments sent by FAX in excess of six pages will not be accepted. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat Staff at (202) 663–4078. (This is not a toll-free number).

Comments received will be available for public inspection in the EEOC Library, room 6502, by appointment only, from 9 a.m. to 5 p.m., Monday through Friday except legal holidays from October 15, 1991, until the Final Regulatory Impact Analysis is published. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. To schedule an appointment call (202) 663–4630 (voice), (202) 663–4630 (TDD).

List of Subjects in 29 CFR Part 1630

Equal employment opportunity, Handicapped, Individuals with disabilities.

For the Commission.

Evan J. Kemp, Jr.,

Chairman.

Accordingly, 29 CFR chapter XIV is amended by adding part 1630 to read as follows:

PART 1630—REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

Sec.

1630.1 Purpose, applicability, and construction.
1630.2 Definitions.
1630.3 Exceptions to the definitions of "Disability" and "Qualified Individual with a Disability."
1630.4 Discrimination prohibited.
1630.5 Limiting, segregating, and classifying.
1630.6 Contractual or other arrangements.
1630.7 Standards, criteria, or methods of administration.
1630.8 Relationship or association with an individual with a disability.
1630.9 Not making reasonable accommodation.
1630.10 Qualification standards, tests, and other selection criteria.
1630.11 Administration of tests.
1630.12 Retaliation and coercion.
1630.13 Prohibited medical examinations and inquiries.
1630.14 Medical examinations and inquiries specifically permitted.
1630.15 Defenses.
1630.16 Specific activities permitted.
Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act

Authority: 42 U.S.C. 12116.

§ 1630.1 Purpose, applicability, and construction.

(a) *Purpose.* The purpose of this part is to implement title I of the Americans with Disabilities Act (42 U.S.C. 12101, *et seq.*) (ADA), requiring equal employment opportunities for qualified individuals with disabilities, and sections 3(2), 3(3), 501, 503, 506(e), 508, 510, and 511 of the ADA as those sections pertain to the employment of qualified individuals with disabilities.

(b) *Applicability.* This part applies to "covered entities" as defined at § 1630.2(b).

(c) *Construction.*—(1) *In general.* Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790–794a), or the regulations issued by Federal agencies pursuant to that title.

(2) *Relationship to other laws.* This part does not invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this part.

§ 1630.2 Definitions.

(a) *Commission* means the Equal Employment Opportunity Commission established by section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4).

(b) *Covered Entity* means an employer, employment agency, labor organization, or joint labor management committee.

(c) *Person, labor organization, employment agency, commerce and industry affecting commerce* shall have the same meaning given those terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(d) *State* means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(e) *Employer.*—(1) *In general.* The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26,

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1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) *Exceptions.* The term employer does not include—

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) A bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(f) *Employee* means an individual employed by an employer.

(g) *Disability* means, with respect to an individual—

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; or

(3) being regarded as having such an impairment.

(See § 1630.3 for exceptions to this definition).

(h) *Physical or mental impairment* means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) *Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) *Substantially limits*—(1) The term *substantially limits* means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of *working*—

(i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

(k) *Has a record of such impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(l) *Is regarded as having such an impairment* means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraphs (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

(m) *Qualified individual with a disability* means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See § 1630.3 for exceptions to this definition).

(n) *Essential functions.*—(1) *In general.* The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(o) *Reasonable accommodation.* (1) The term *reasonable accommodation* means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) *Reasonable accommodation* may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(p) *Undue hardship*—(1) *In general. Undue hardship* means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) *Factors to be considered.* In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii)The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(q) *Qualification standards* means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

(r) *Direct Threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

§ 1630.3 Exceptions to the definitions of "Disability" and "Qualified individual with a Disability."

(a) The terms *disability* and *qualified individual with a disability* do not include individuals currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(1) *Drug* means a controlled substance, as defined in schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C 812).

(2) *Illegal use of drugs* means the use of drugs the possession or distribution of which is unlawful under the Controlled Substances Act, as periodically updated by the Food and Drug Administration. This term does not include the use of a drug taken under the supervision of a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(b) However, the terms *disability* and *qualified* individual with a disability may not exclude an individual who:

(1) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs; or

(2) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(c) It shall not be a violation of this part for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (b) (1) or (2) of this section is no longer engaging in the illegal use of drugs. (See § 1630.16(c) Drug testing).

(d) *Disability* does not include:

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

(e) *Homosexuality and bisexuality* are not impairments and so are not disabilities as defined in this part.

§ 1630.4 Discrimination prohibited.

It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to:

(a) Recruitment, advertising, and job application procedures;

(b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(c) Rates of pay or any other form of compensation and changes in compensation;

(d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(e) Leaves of absence, sick leave, or any other leave;

(f) Fringe benefits available by virtue of employment, whether or not administered by the covered entity;

(g) Selection and financial support for training, including apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

(h) Activities sponsored by a covered entity including social and recreational programs; and

(i) Any other term, condition, or privilege of employment.

The term *discrimination* includes, but is not limited to, the acts described in §§ 1630.5 through 1630.13 of this part.

§ 1630.5 Limiting segregating, and classifying.

It is unlawful for a covered entity to limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability.

§ 1630.6 Contractual or other arrangements.

(a) *In general.* It is unlawful for a covered entity to participate in a contractual or other arrangement or relationship that has the effect of subjecting the covered entity's own qualified applicant or employee with a disability to the discrimination prohibited by this part.

(b) *Contractual or other arrangement defined.* The phrase *contractual or other arrangement or relationship* includes, but is not limited to, a relationship with an employment or referral agency; labor union, including collective bargaining agreements; an organization providing fringe benefits to an employee of the covered entity; or an organization providing training and apprenticeship programs.

(c) *Application.* This section applies to a covered entity, with respect to its own applicants or employees, whether the entity offered the contract or initiated the relationship, or whether the entity accepted the contract or acceded to the relationship. A covered entity is not liable for the actions of the other party or parties to the contract which only affect that other party's employees or applicants.

§ 1630.7 Standards, criteria, or methods of administration.

It is unlawful for a covered entity to use standards, criteria, or methods of administration, which are not job-related and consistent with business necessity, and:

(a) That have the effect of discriminating on the basis of disability; or

(b) That perpetuate the discrimination of others who are subject to common administrative control.

§ 1630.8 Relationship or association with an individual with a disability.

It is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association.

§ 1630.9 Not making reasonable accommodation.

(a) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

(b) It is unlawful for a covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual's physical or mental impairments.

(c) A covered entity shall not be excused from the requirements of this part because of any failure to receive technical assistance authorized by section 506 of the ADA, including any failure in the development or dissemination of any technical assistance manual authorized by that Act.

(d) A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.

§ 1630.10 Qualification standards, tests, and other selection criteria.

It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

§ 1630.11 Administration of tests.

It is unlawful for a covered entity to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

§ 1630.12 Retaliation and coercion.

(a) *Retaliation.* It is unlawful to discriminate against any individual because that individual has opposed any act or practice made unlawful by this part or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing to enforce any provision contained in this part.

(b) *Coercion, interference or intimidation.* It is unlawful to coerce, intimidate, threaten, harass or interfere with any individual in the exercise or enjoyment of, or because that individual aided or encouraged any other individual in the exercise of, any right granted or protected by this part.

§ 1630.13 Prohibited medical examinations and inquiries.

(a) *Pre-employment examination or inquiry.* Except as permitted by § 1630.14, it is unlawful for a covered entity to conduct a medical examination of an applicant or to make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability.

(b) *Examination or inquiry of employees.* Except as permitted by § 1630.14, it is unlawful for a covered entity to require a medical examination of an employee or to make inquiries as to whether an employee is an individual with a disability or as to the nature or severity of such disability.

§ 1630.14 Medical examinations and inquiries specifically permitted.

(a) *Acceptable pre-employment inquiry.* A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

(b) *Employment entrance examination.* A covered entity may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the results of

such examination (and/or inquiry), if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of disability.

(1) Information obtained under paragraph (b) of this section regarding the medical condition or history of the applicant shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) The results of such examination shall not be used for any purpose inconsistent with this part.

(3) Medical examinations conducted in accordance with this section do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation as required in this part. (See § 1630.15(b) Defenses to charges of discriminatory application of selection criteria.)

(c) *Examination of employees.* A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(1) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall be used only in accordance with this part.

(d) *Other acceptable examinations and inquiries.* A covered entity may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site.

(1) Information obtained under paragraph (d) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) Information obtained under paragraph (d) of this section regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this part.

§ 1630.15 Defenses.

Defenses to an allegation of discrimination under this part may include, but are not limited to, the following:

(a) *Disparate treatment charges.* It may be a defense to a charge of disparate treatment brought under §§ 1630.4 through 1630.8 and 1630.11 through 1630.12 that the challenged action is justified by a legitimate, nondiscriminatory reason.

(b) *Charges of discriminatory application of selection criteria—(1) In general.* It may be a defense to a charge of discrimination, as described in § 1630.10, that an alleged application of qualification standards, tests, or selection criteria that screens out or tends to screen out or otherwise denies a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.

(2) *Direct threat as a qualification standard.* The term "qualification standard" may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace. (See § 1630.2(r) defining direct threat.)

(c) *Other disparate impact charges.* It may be a defense to a charge of discrimination brought under this part that a uniformly applied standard, criterion, or policy has a disparate impact on an individual with a disability or a class of individuals with disabilities that the challenged standard, criterion or policy has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.

(d) *Charges of not making reasonable accommodation.* It may be a defense to a charge of discrimination, as described in § 1630.9, that a requested or necessary accommodation would impose an undue hardship on the operation of the covered entity's business.

(e) *Conflict with other federal laws.* It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

(f) *Additional defenses.* It may be a defense to a charge of discrimination under this part that the alleged discriminatory action is specifically permitted by §§ 1630.14 or 1630.16.

§ 1630.16 Specific activities permitted.

(a) *Religious entities.* A religious corporation, association, educational institution, or society is permitted to give preference in employment to individuals of a particular religion to perform work connected with the carrying on by that corporation, association, educational institution, or society of its activities. A religious entity may require that all applicants and employees conform to the religious tenets of such organization. However, a religious entity may not discriminate against a qualified individual, who satisfies the permitted religious criteria, because of his or her disability.

(b) *Regulation of alcohol and drugs.* A covered entity:

(1) May prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) May require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) May require that all employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) May hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which the entity holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use or alcoholism;

(5) May require that its employees employed in an industry subject to such regulations comply with the standards established in the regulations (if any) of the Departments of Defense and Transportation, and of the Nuclear Regulatory Commission, regarding alcohol and the illegal use of drugs; and

(6) May require that employees employed in sensitive positions comply with the regulations (if any) of the Departments of Defense and Transportation and of the Nuclear Regulatory Commission that apply to employment in sensitive positions subject to such regulations.

(c) *Drug testing*—(1) *General policy.* For purposes of this part, a test to determine the illegal use of drugs is not considered a medical examination. Thus, the administration of such drug tests by a covered entity to its job applicants or employees is not a violation of § 1630.13 of this part. However, this part does not encourage, prohibit, or authorize a covered entity to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.

(2) *Transportation Employees.* This part does not encourage, prohibit, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to:

(i) Test employees of entities in, and applicants for, positions involving safety sensitive duties for the illegal use of drugs or for on-duty impairment by alcohol; and

(ii) Remove from safety-sensitive positions persons who test positive for illegal use of drugs or on-duty impairment by alcohol pursuant to paragraph (c)(2)(i) of this section.

(3) *Confidentiality.* Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to the requirements of § 1630.14(b) (2) and (3) of this part.

(d) *Regulation of smoking.* A covered entity may prohibit or impose restrictions on smoking in places of employment. Such restrictions do not violate any provision of this part.

(e) *Infectious and communicable diseases; food handling jobs*—(1) *In general.* Under title I of the ADA, section 103(d)(1), the Secretary of Health and Human Services is to prepare a list, to be updated annually, of infectious and communicable diseases which are transmitted through the handling of food. [Copies may be obtained from Center for Infectious Diseases, Centers for Disease Control, 1600 Clifton Road, NE., Mailstop C09, Atlanta, GA 30333.] If an individual with a disability is disabled by one of the infectious or communicable diseases included on this list, and if the risk of transmitting the disease associated with the handling of food cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling. However, if the individual with a disability is a current employee, the employer must consider whether he or she can be accommodated by reassignment to a vacant position not involving food handling.

(2) *Effect on state or other laws.* This part does not preempt, modify, or amend any State, county, or local law, ordinance or regulation applicable to food handling which:

(i) Is in accordance with the list, referred to in paragraph (e)(1) of this section, of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services; and

(ii) Is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, where that risk cannot be eliminated by reasonable accommodation.

(f) *Health insurance, life insurance, and other benefit plans*—(1) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with State law.

(2) A covered entity may establish, sponsor, observe or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

(3) A covered entity may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(4) The activities described in paragraphs (f) (1), (2), and (3) of this section are permitted unless these activities are being used as a subterfuge to evade the purposes of this part.

Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act

Background

The ADA is a federal antidiscrimination statute designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities.

Like the Civil Rights Act of 1964 that prohibits discrimination on the bases of race, color, religion, national origin, and sex, the ADA seeks to ensure access to equal employment opportunities based on merit. It does not guarantee equal results, establish quotas, or require preferences favoring individuals with disabilities over those without disabilities.

However, while the Civil Rights Act of 1964 prohibits any consideration of personal characteristics such as race or national origin, the ADA necessarily takes a different approach. When an individual's disability creates a barrier to employment opportunities, the ADA requires employers to consider whether reasonable accommodation could remove the barrier.

The ADA thus establishes a process in which the employer must assess a disabled individual's ability to perform the essential functions of the specific job held or desired. While the ADA focuses on eradicating barriers, the ADA does not relieve a disabled employee or applicant from the obligation to perform the essential functions of the job. To the contrary, the ADA is intended to enable disabled persons to compete in the workplace based on the same performance standards and requirements that employers expect of persons who are not disabled.

However, where that individual's functional limitation impedes such job performance, an employer must take steps to reasonably accommodate, and thus help overcome the particular impediment, unless to do so would impose an undue hardship. Such accommodations usually take the form of adjustments to the way a job customarily is performed, or to the work environment itself.

This process of identifying whether, and to what extent, a reasonable accommodation is required should be flexible and involve both the employer and the individual with a disability. Of course, the determination of whether an individual is qualified for a particular position must necessarily be made on a case-by-case basis. No specific form of accommodation is guaranteed for all individuals with a particular disability.

Rather, an accommodation must be tailored to match the needs of the disabled individual with the needs of the job's essential functions.

This case-by-case approach is essential if qualified individuals of varying abilities are to receive equal opportunities to compete for an infinitely diverse range of jobs. For this reason, neither the ADA nor this part can supply the "correct" answer in advance for each employment decision concerning an individual with a disability. Instead, the ADA simply establishes parameters to guide employers in how to consider, and take into account, the disabling condition involved.

Introduction

The Equal Employment Opportunity Commission (the Commission or EEOC) is responsible for enforcement of title I of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.* (1990), which prohibits employment discrimination on the basis of disability. The Commission believes that it is essential to issue interpretive guidance concurrently with the issuance of this part in order to ensure that qualified individuals with disabilities understand their rights under this part and to facilitate and encourage compliance by covered entities. This appendix represents the Commission's interpretation of the issues discussed, and the Commission will be guided by it when resolving charges of employment discrimination. The appendix addresses the major provisions of this part and explains the major concepts of disability rights.

The terms "employer" or "employer or other covered entity" are used interchangeably throughout the appendix to refer to all covered entities subject to the employment provisions of the ADA.

Section 1630.1 Purpose, Applicability and Construction

Section 1630.1(a) Purpose

The Americans with Disabilities Act was signed into law on July 26, 1990. It is an antidiscrimination statute that requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities are given. An individual who is qualified for an employment opportunity cannot be denied that opportunity because of the fact that the individual is disabled. The purpose of title I and this part is to ensure that qualified individuals with disabilities are protected from discrimination on the basis of disability.

The ADA uses the term "disabilities" rather than the term "handicaps" used in the Rehabilitation Act of 1973, 29 U.S.C. 701–796. Substantively, these terms are equivalent. As noted by the House Committee on the Judiciary, "[t]he use of the term 'disabilities' instead of the term 'handicaps' reflects the desire of the Committee to use the most current terminology. It reflects the preference of persons with disabilities to use that term rather than 'handicapped' as used in previous laws, such as the Rehabilitation Act of 1973." [ ] H.R. Rep. No. 485 part 3, 101st Cong., 2d Sess. 28–27 (1990) (hereinafter House Judiciary Report); see also S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989) (hereinafter Senate Report); H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess. 50–51 (1990) (hereinafter House Labor Report).

The use of the term "Americans" in the title of the ADA is not intended to imply that the Act only applies to United States citizens. Rather, the ADA protects all qualified individuals with disabilities, regardless of their citizenship status or nationality.

Section 1630.1(b) and (c) Applicability and Construction

Unless expressly stated otherwise, the standards applied in the ADA are not intended to be lesser than the standards applied under the Rehabilitation Act of 1973.

The ADA does not preempt any Federal law, or any state or local law, that grants to individuals with disabilities protection greater than or equivalent to that provided by the ADA. This means that the existence of a lesser standard of protection to individuals with disabilities under the ADA will not provide a defense to failing to meet a higher standard under another law. Thus, for example, title I of the ADA would not be a defense to failing to collect information required to satisfy the affirmative action requirements of section 503 of the Rehabilitation Act. On the other hand, the existence of a lesser standard under another law will not provide a defense to failing to meet a higher standard under the ADA. See House Labor Report at 135; House Judiciary Report at 69–70.

This also means that an individual with a disability could choose to pursue claims under a state discrimination or tort law that does not confer greater substantive rights, or even confers fewer substantive rights, if the potential available remedies would be greater than those available under the ADA and this part. The ADA does not restrict an individual with a disability from pursuing such claims in addition to charges brought under this part. House Judiciary at 69–70.

The ADA does not automatically preempt medical standards or safety requirements established by Federal law or regulations. It does not preempt State, county, or local laws, ordinances or regulations that are consistent with this part, and are designed to protect the public health from individuals who pose a direct threat, that cannot be eliminated or reduced by reasonable accommodation, to the health or safety of others. However, the ADA does preempt inconsistent requirements established by state or local law for safety or security sensitive positions. See Senate Report at 27; House Labor Report at 57.

An employer allegedly in violation of this part cannot successfully defend its actions by relying on the obligation to comply with the requirements of any state or local law that imposes prohibitions or limitations on the eligibility of qualified individuals with disabilities to practice any occupation or profession. For example, suppose a municipality has an ordinance that prohibits individuals with tuberculosis from teaching school children. If an individual with dormant tuberculosis challenges a private school's refusal to hire him or her because of the tuberculosis, the private school would not be able to rely on the city ordinance as a defense under the ADA.

Sections 1630.2(a)–(f) Commission, Covered Entity, etc.

The definitions section of part 1630 includes several terms that are identical, or almost identical, to the terms found in title VII of the Civil Rights Act of 1964. Among these terms are "Commission," "Person," "State," and "Employer." These terms are to be given the same meaning under the ADA that they are given under title VII.

In general, the term "employee" has the same meaning that it is given under title VII. However, the ADA's definition of "employee" does not contain an exception, as does title VII, for elected officials and their personal staffs. It should be further noted that all state and local governments are covered by title II of the ADA whether or not they are also covered by this part. Title II, which is enforced by the Department of Justice, becomes effective on January 26, 1992. See 28 CFR part 35.

The term "covered entity" is not found in title VII. However, the title VII definitions of the entities included in the term "covered entity" (*e.g.*, employer, employment agency, etc.) are applicable to the ADA.

Section 1630.2(g) Disability

In addition to the term "covered entity," there are several other terms that are unique to the ADA. The first of these is the term "disability." Congress adopted the definition of this term from the Rehabilitation Act definition of the term "individual with handicaps." By so doing, Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term "disability" as used in the ADA. Senate Report at 21; House Labor Report at 50; House Judiciary Report at 27.

The definition of the term "disability" is divided into three parts. An individual must satisfy at least one of these parts in order to be considered an individual with a disability for purposes of this part. An individual is considered to have a "disability" if that individual either: (1) has a physical or mental impairment which substantially limits one or more of that person's major life activities, (2) has a record of such an impairment, or, (3) is regarded by the covered entity as having such an impairment. To understand the meaning of the term "disability," it is necessary to understand, as a preliminary matter, what is meant by the terms "physical or mental impairment," "major life activity," and "substantially limits." Each of these terms is discussed below.

Section 1630.2(h) Physical or Mental Impairment

This term adopts the definition of the term "physical or mental impairment" found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. It defines physical or mental impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or any mental or psychological disorder.

The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. See Senate Report at 23.

House Labor Report at 52; House Judiciary Report at 28. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid.

It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within "normal" range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part. See Senate Report at 22–23; House Labor Report at 51–52; House Judiciary Report at 28–29.

Section 1630.2(i) Major Life Activities

This term adopts the definition of the term "major life activities" found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. "Major life activities" are those basic activities that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching. See Senate Report at 22; House Labor Report at 52; House Judiciary Report at 28.

Section 1630.2(j) Substantially Limits

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities. Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability.

The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

Other impairments, however, such as HIV infection, are inherently substantially limiting.

On the other hand, temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza. Similarly, except in rare circumstances, obesity is not considered a disabling impairment.

An impairment that prevents an individual from performing a major life activity substantially limits that major life activity. For example, an individual whose legs are paralyzed is substantially limited in the major life activity of walking because he or she is unable, due to the impairment, to perform that major life activity.

Alternatively, an impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity. Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking. An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication. See Senate Report at 23; House Labor Report at 52. It should be noted that the term "average person" is not intended to imply a precise mathematical "average."

Part 1630 notes several factors that should be considered in making the determination of whether an impairment is substantially limiting. These factors are (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment. The term "duration," as used in this context, refers to the length of time an impairment persists, while the term "impact" refers to the residual effects of an impairment. Thus, for example, a broken leg that takes eight weeks to heal is an impairment of fairly brief duration. However, if the broken leg heals improperly, the "impact" of the impairment would be the resulting permanent limp. Likewise, the effect on cognitive functions resulting from traumatic head injury would be the "impact" of that impairment.

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices. An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the factors noted above, does not amount to a significant restriction when compared with the abilities of the average person. For example, an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at moderately below average speed.

It is important to remember that the restriction on the performance of the major life activity must be the result of a condition that is an impairment. As noted earlier, advanced age, physical or personality characteristics, and environmental, cultural, and economic disadvantages are not impairments. Consequently, even if such factors substantially limit an individual's ability to perform a major life activity, this limitation will not constitute a disability. For example, an individual who is unable to read because he or she was never taught to read would not be an individual with a disability because lack of education is not an impairment. However, an individual who is unable to read because of dyslexia would be an individual with a disability because dyslexia, a learning disability, is an impairment.

If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working. For example, if an individual is blind, *i.e.*, substantially limited in the major life activity of seeing, there is no need to determine whether the individual is also substantially limited in the major life activity of working. The determination of whether an individual is substantially limited in working must also be made on a case by case basis.

This part lists specific factors that may be used in making the determination of whether the limitation in working is "substantial." These factors are:

(1) The geographical area to which the individual has reasonable access;

(2) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(3) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Thus, an individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. For example, an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working. Nor would a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball be considered substantially limited in the major life activity of working. In both of these examples, the individuals are not substantially limited in the ability to perform any other major life activity and, with regard to the major life activity of working, are only unable to perform either a particular specialized job or a narrow range of jobs. See *Forrisi* v. *Bowen*, 794 F.2d 931 (4th Cir. 1986); *Jasany* v. *U.S. Postal Service*, 755 F.2d 1244 (6th Cir. 1985); *E.E Black, Ltd.* v. *Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980).

On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, *e.g.*, the class of semi-skilled jobs. Similarly, suppose an individual has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult. Since this individual would be substantially limited in the ability to perform the broad range of jobs in various classes that are conducted in high rise office buildings within the geographical area to which he or she has reasonable access, he or she would be substantially limited in working.

The terms "number and types of jobs" and "number and types of other jobs," as used in the factors discussed above, are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (*e.g.*, "few," "many," "most") from which an individual would be excluded because of an impairment.

If an individual has a "mental or physical impairment" that "substantially limits" his or her ability to perform one or more "major life activities," that individual will satisfy the first part of the regulatory definition of "disability" and will be considered an individual with a disability. An individual who satisfies this first part of the definition of the term "disability" is not required to demonstrate that he or she satisfies either of the other parts of the definition. However, if an individual is unable to satisfy this part of the definition, he or she may be able to satisfy one of the other parts of the definition.

Section 1630.2(k) Record of a Substantially Limiting Condition

The second part of the definition provides that an individual with a record of an impairment that substantially limits a major life activity is an individual with a disability. The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. For example, this provision protects former cancer patients from discrimination based on their prior medical history. This provision also ensures that individuals are not discriminated against because they have been misclassified as disabled. For example, individuals misclassified as learning disabled are protected from discrimination on the basis of that erroneous classification. Senate Report at 23; House Labor Report at 52–53; House Judiciary Report at 29.

This part of the definition is satisfied if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities. There are many types of records that could potentially contain this information, including but not limited to, education, medical, or employment records.

The fact that an individual has a record of being a disabled veteran, or of disability retirement, or is classified as disabled for other purposes does not guarantee that the individual will satisfy the definition of "disability" under part 1630. Other statutes, regulations and programs may have a definition of "disability" that is not the same as the definition set forth in the ADA and contained in part 1630. Accordingly, in order for an individual who has been classified in a record as "disabled" for some other purpose to be considered disabled for purposes of part 1630, the impairment indicated in the record must be a physical or mental impairment that substantially limits one or more of the individual's major life activities.

Section 1630.2(l) Regarded as Substantially Limited in a Major Life Activity

If an individual cannot satisfy either the first part of the definition of "disability" or the second "record of" part of the definition, he or she may be able to satisfy the third part of the definition. The third part of the definition provides that an individual who is regarded by an employer or other covered entity as having an impairment that substantially limits a major life activity is an individual with a disability.

There are three different ways in which an individual may satisfy the definition of "being regarded as having a disability."

(1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;

(2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or

(3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.

Senate Report at 23; House Labor Report at 53; House Judiciary Report at 28.

An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

An individual satisfies the second part of the "regarded as" definition if the individual has an impairment that is only substantially limiting because of the attitudes of others toward the condition. For example, an individual may have a prominent facial scar or disfigurement, or may have a condition that periodically causes an involuntary jerk of the head but does not limit the individual's major life activities. If an employer discriminates against such an individual because of the negative reactions of customers, the employer would be regarding the individual as disabled and acting on the basis of that perceived disability. See Senate Report at 24; House Labor Report at 53; House Judiciary Report at 30–31.

An individual satisfies the third part of the "regarded as" definition of "disability" if the employer or other covered entity erroneously believes the individual has a substantially limiting impairment that the individual actually does not have. This situation could occur, for example, if an employer discharged an employee in response to a rumor that the employee is infected with Human Immunodeficiency Virus (HIV). Even though the rumor is totally unfounded and the individual has no impairment at all, the individual is considered an individual with a disability because the employer perceived of this individual as being disabled. Thus, in this example, the employer, by discharging this employee, is discriminating on the basis of disability.

The rationale for the "regarded as" part of the definition of disability was articulated by the Supreme Court in the context of the Rehabilitation Act of 1973 in *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987). The Court noted that, although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283. The Court concluded that by including "regarded as" in the Rehabilitation Act's

definition, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." 480 U.S. at 284.

An individual rejected from a job because of the "myths, fears and stereotypes" associated with disabilities would be covered under this part of the definition of disability, whether or not the employer's or other covered entity's perception were shared by others in the field and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. As the legislative history notes, sociologists have identified common attitudinal barriers that frequently result in employers excluding individuals with disabilities. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers' compensation costs, and acceptance by coworkers and customers.

Therefore, if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear or stereotype" can be drawn.

Section 1630.2(m) Qualified Individual With a Disability

The ADA prohibits discrimination on the basis of disability against qualified individuals with disabilities. The determination of whether an individual with a disability is "qualified" should be made in two steps. The first step is to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc. For example, the first step in determining whether an accountant who is paraplegic is qualified for a certified public accountant (CPA) position is to examine the individual's credentials to determine whether the individual is a licensed CPA. This is sometimes referred to in the Rehabilitation Act caselaw as determining whether the individual is "otherwise qualified" for the position. See Senate Report at 33; House Labor Report at 60–65. (See § 1630.9 Not Making Reasonable Accommodation).

The second step is to determine whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation. The purpose of this second step is to ensure that individuals with disabilities who can perform the essential functions of the position held or desired are not denied employment opportunities because they are not able to perform marginal functions of the position. House Labor Report at 55.

The determination of whether an individual with a disability is qualified is to be made at the time of the employment decision. This determination should be based on the capabilities of the individual with a disability at the time of the employment decision, and should not be based on speculation that the employee may become unable in the future or may cause increased health insurance premiums or workers compensation costs.

Section 1630.2(n) Essential Functions

The determination of which functions are essential may be critical to the determination of whether or not the individual with a disability is qualified. The essential functions are those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable accommodation.

The inquiry into whether a particular function is essential initially focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential. For example, an employer may state that typing is an essential function of a position. If, in fact, the employer has never required any employee in that particular position to type, this will be evidence that typing is not actually an essential function of the position.

If the individual who holds the position is actually required to perform the function the employer asserts is an essential function, the inquiry will then center around whether removing the function would fundamentally alter that position. This determination of whether or not a particular function is essential will generally include one or more of the following factors listed in part 1630.

The first factor is whether the position exists to perform a particular function. For example, an individual may be hired to proofread documents. The ability to proofread the documents would then be an essential function, since this is the only reason the position exists.

The second factor in determining whether a function is essential is the number of other employees available to perform that job function or among whom the performance of that job function can be distributed. This may be a factor either because the total number of available employees is low, or because of the fluctuating demands of the business operation. For example, if an employer has a relatively small number of available employees for the volume of work to be performed, it may be necessary that each employee perform a multitude of different functions. Therefore, the performance of those functions by each employee becomes more critical and the options for reorganizing the work become more limited. In such a situation, functions that might not be essential if there were a larger staff may become essential because the staff size is small compared to the volume of work that has to be done. See *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983).

A similar situation might occur in a larger work force if the workflow follows a cycle of heavy demand for labor intensive work followed by low demand periods. This type of workflow might also make the performance of each function during the peak periods more critical and might limit the employer's flexibility in reorganizing operating procedures. See *Dexler v. Tisch*, 660 F. Supp. 1418 (D. Conn. 1987).

The third factor is the degree of expertise or skill required to perform the function. In certain professions and highly skilled positions the employee is hired for his or her expertise or ability to perform the particular function. In such a situation, the performance of that specialized task would be an essential function.

Whether a particular function is essential is a factual determination that must be made on a case by case basis. In determining whether or not a particular function is essential, all relevant evidence should be considered. Part 1630 lists various types of evidence, such as an established job description, that should be considered in determining whether a particular function is essential. Since the list is not exhaustive, other relevant evidence may also be presented. Greater weight will not be granted to the types of evidence included on the list than to the types of evidence not listed.

Although part 1630 does not require employers to develop or maintain job descriptions, written job descriptions prepared before advertising or interviewing applicants for the job, as well as the employer's judgment as to what functions are essential are among the relevant evidence to be considered in determining whether a particular function is essential. The terms of a collective bargaining agreement are also relevant to the determination of whether a particular function is essential. The work experience of past employees in the job or of current employees in similar jobs is likewise relevant to the determination of whether a particular function is essential. See H.R. Conf. Rep. No. 101–596, 101st Cong., 2d Sess. 56 (1990) [hereinafter Conference Report] House Judiciary Report at 33–34. See also *Hall v. U.S. Postal Service*, 857 F.2d 1073 (6th Cir. 1988).

The time spent performing the particular function may also be an indicator of whether that function is essential. For example, if an employee spends the vast majority of his or her time working at a cash register, this would be evidence that operating the cash register is an essential function. The consequences of failing to require the employee to perform the function may be another indicator of whether a particular function is essential. For example, although a firefighter may not regularly have to carry an unconscious adult out of a burning building, the consequence of failing to require the firefighter to be able to perform this function would be serious.

It is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards. (See § 1630.10 Qualification Standards, Tests and Other Selection Criteria). If an employer requires its typists to be able to accurately type 75 words per minute, it will not be called upon to explain why an inaccurate work product, or a typing speed of 48 words per minute, would not be adequate. Similarly, if a hotel requires its service workers to thoroughly clean 16 rooms per day, it will not have to explain why it requires thorough

cleaning, or why it chose a 19 room rather than a 10 room requirement. However, if an employer does require accurate 75 word per minute typing or the thorough cleaning of 10 rooms, it will have to show that it actually imposes such requirements on its employees in fact, and not simply on paper. It should also be noted that, if it is alleged that the employer intentionally selected the particular level of production to exclude individuals with disabilities, the employer may have to offer a legitimate, nondiscriminatory reason for its selection.

Section 1630.2(o) Reasonable Accommodation

An individual is considered a "qualified individual with a disability" if the individual can perform the essential functions of the position held or desired with or without reasonable accommodation. In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. There are three categories of reasonable accommodation. These are: (1) accommodations that are required to ensure equal opportunity in the application process; (2) accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired; and (3) accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities. It should be noted that nothing in this part prohibits employers or other covered entities from providing accommodations beyond those required by this part.

Part 1630 lists the examples, specified in title I of the ADA, of the most common types of accommodation that an employer or other covered entity may be required to provide. There are any number of other specific accommodations that may be appropriate for particular situations but are not specifically mentioned in this listing. This listing is not intended to be exhaustive of accommodation possibilities. For example, other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment, making employer provided transportation accessible, and providing reserved parking spaces. Providing personal assistants, such as a page turner for an employee with no hands or a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips, may also be a reasonable accommodation. Senate Report at 31; House Labor Report at 62; House Judiciary Report at 39.

It may also be a reasonable accommodation to permit an individual with a disability the opportunity to provide and utilize equipment, aids or services that an employer is not required to provide as a reasonable accommodation. For example, it would be a reasonable accommodation for an employer to permit an individual who is blind to use a guide dog at work, even though the employer would not be required to provide a guide dog for the employee.

The accommodations included on the list of reasonable accommodations are generally self explanatory. However, there are a few that require further explanation. One of these is the accommodation of making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities. This accommodation includes both those areas that must be accessible for the employee to perform essential job functions, as well as non-work areas used by the employer's employees for other purposes. For example, accessible break rooms, lunch rooms, training rooms, restrooms etc., may be required as reasonable accommodations.

Another of the potential accommodations listed is "job restructuring." An employer or other covered entity may restructure a job by reallocating or redistributing nonessential, marginal job functions. For example, an employer may have two jobs, each of which entails the performance of a number of marginal functions. The employer hires a qualified individual with a disability who is able to perform some of the marginal functions of each job but not all of the marginal functions of either job. As an accommodation, the employer may redistribute the marginal functions so that all of the marginal functions that the qualified individual with a disability can perform are made a part of the position to be filled by the qualified individual with a disability. The remaining marginal functions that the individual with a disability cannot perform would then be transferred to the other position. See Senate Report at 31; House Labor Report at 62.

An employer or other covered entity is not required to reallocate essential functions. The essential functions are by definition those that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position. For example, suppose a security guard position requires the individual who holds the job to inspect identification cards. An employer would not have to provide an individual who is legally blind with an assistant to look at the identification cards for the legally blind employee. In this situation the assistant would be performing the job for the individual with a disability rather than assisting the individual to perform the job. See *Coleman v. Darden*, 595 F.2d 533 (10th Cir. 1979).

An employer or other covered entity may also restructure a job by altering when and/or how an essential function is performed. For example, an essential function customarily performed in the early morning hours may be rescheduled until later in the day as a reasonable accommodation to a disability that precludes performance of the function at the customary hour. Likewise, as a reasonable accommodation, an employee with a disability that inhibits the ability to write, may be permitted to computerize records that were customarily maintained manually.

Reassignment to a vacant position is also listed as a potential reasonable accommodation. In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship. Reassignment is not available to applicants. An applicant for a position must be qualified for, and be able to perform the essential functions of, the position sought with or without reasonable accommodation.

Reassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions or to designated offices or facilities. Employers should reassign the individual to an equivalent position, in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. A "reasonable amount of time" should be determined in light of the totality of the circumstances. As an example, suppose there is no vacant position available at the time that an individual with a disability requests reassignment as a reasonable accommodation. The employer, however, knows that an equivalent position for which the individual is qualified, will become vacant next week. Under these circumstances, the employer should reassign the individual to the position when it becomes available.

An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation. An employer, however, is not required to maintain the reassigned individual with a disability at the salary of the higher graded position if it does not so maintain reassigned employees who are not disabled. It should also be noted that an employer is not required to promote an individual with a disability as an accommodation. See Senate Report at 31–32; House Labor Report at 63.

The determination of which accommodation is appropriate in a particular situation involves a process in which the employer and employee identify the precise limitations imposed by the disability and explore potential accommodations that would overcome those limitations. This process is discussed more fully in § 1630.9 Not Making Reasonable Accommodation.

Section 1630.2(p) Undue Hardship

An employer or other covered entity is not required to provide an accommodation that will impose an undue hardship on the operation of the employer's or other covered entity's business. The term "undue hardship" means significant difficulty or expense in, or resulting from, the provision of the accommodation. The "undue hardship" provision takes into account the financial realities of the particular employer or other covered entity. However, the concept of undue hardship is not limited to financial difficulty. "Undue hardship" refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business. See Senate Report at 35; House Labor Report at 67.

For example, suppose an individual with a disabling visual impairment that makes it extremely difficult to see in dim lighting applies for a position as a waiter in a

nightclub and requests that the club be brightly lit as a reasonable accommodation. Although the individual may be able to perform the job in bright lighting, the nightclub will probably be able to demonstrate that that particular accommodation, though inexpensive, would impose an undue hardship if the bright lighting would destroy the ambience of the nightclub and/or make it difficult for the customers to see the stage show. The fact that that particular accommodation poses an undue hardship, however, only means that the employer is not required to provide that accommodation. If there is another accommodation that will not create an undue hardship, the employer would be required to provide the alternative accommodation.

An employer's claim that the cost of a particular accommodation will impose an undue hardship will be analyzed in light of the factors outlined in part 1630. In part, this analysis requires a determination of whose financial resources should be considered in deciding whether the accommodation is unduly costly. In some cases the financial resources of the employer or other covered entity in its entirety should be considered in determining whether the cost of an accommodation poses an undue hardship. In other cases, consideration of the financial resources of the employer or other covered entity as a whole may be inappropriate because it may not give an accurate picture of the financial resources available to the particular facility that will actually be required to provide the accommodation. See House Labor Report at 68–69; House Judiciary Report at 40–41; see also Conference Report at 56–57.

If the employer or other covered entity asserts that only the financial resources of the facility where the individual will be employed should be considered, part 1630 requires a factual determination of the relationship between the employer or other covered entity and the facility that will provide the accommodation. As an example, suppose that an independently owned fast food franchise that receives no money from the franchisor refuses to hire an individual with a hearing impairment because it asserts that it would be an undue hardship to provide an interpreter to enable the individual to participate in monthly staff meetings. Since the financial relationship between the franchisor and the franchise is limited to payment of an annual franchise fee, only the financial resources of the franchise would be considered in determining whether or not providing the accommodation would be an undue hardship. See House Labor Report at 68; House Judiciary Report at 40.

If the employer or other covered entity can show that the cost of the accommodation would impose an undue hardship, it would still be required to provide the accommodation if the funding is available from another source, e.g., a State vocational rehabilitation agency, or if Federal, State or local tax deductions or tax credits are available to offset the cost of the accommodation. If the employer or other covered entity receives, or is eligible to receive, monies from an external source that would pay the entire cost of the accommodation, it cannot claim cost as an undue hardship. In the absence of such funding, the individual with a disability requesting the accommodation should be given the option of providing the accommodation or of paying that portion of the cost which constitutes the undue hardship on the operation of the business. To the extent that such monies pay or would pay for only part of the cost of the accommodation, only that portion of the cost of the accommodation that could not be recovered—the final net cost to the entity—may be considered in determining undue hardship. [See § 1630.9 Not Making Reasonable Accommodation]. See Senate Report at 36; House Labor Report at 69.

Section 1630.2(r) Direct Threat

An employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of himself/herself or others. Like any other qualification standard, such a standard must apply to all applicants or employees and not just to individuals with disabilities. If, however, an individual poses a direct threat as a result of a disability, the employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. If no accommodation exists that would either eliminate or reduce the risk, the employer may refuse to hire an applicant or may discharge an employee who poses a direct threat.

An employer, however, is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e., high probability, of substantial harm; a speculative or remote risk is insufficient. See Senate Report at 27; House Report Labor Report at 56–57; House Judiciary Report at 45.

Determining whether an individual poses a significant risk of substantial harm to others must be made on a case by case basis. The employer should identify the specific risk posed by the individual. For individuals with mental or emotional disabilities, the employer must identify the specific behavior on the part of the individual that would pose the direct threat. For individuals with physical disabilities, the employer must identify the aspect of the disability that would pose the direct threat. The employer should then consider the four factors listed in part 1630:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

Such consideration must rely on objective, factual evidence—not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes—about the nature or effect of a particular disability, or of disability generally. See Senate Report at 27; House Labor Report at 55–57; House Judiciary Report at 45–46. See also *Strathie* v. *Department of Transportation*, 716 F.2d 227 (3d Cir. 1983). Relevant evidence may include input from the individual with a disability, the experience of the individual with a disability in previous similar positions, and opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability.

An employer is also permitted to require that an individual not pose a direct threat of harm to his or her own safety or health. If performing the particular functions of a job would result in a high probability of substantial harm to the individual, the employer could reject or discharge the individual unless a reasonable accommodation that would not cause an undue hardship would avert the harm. For example, an employer would not be required to hire an individual, disabled by narcolepsy, who frequently and unexpectedly loses consciousness for a carpentry job the essential functions of which require the use of power saws and other dangerous equipment, where no accommodation exists that will reduce or eliminate the risk.

The assessment that there exists a high probability of substantial harm to the individual, like the assessment that there exists a high probability of substantial harm to others, must be strictly based on valid medical analyses and/or on other objective evidence. This determination must be based on individualized factual data, using the factors discussed above, rather than on stereotypic or patronizing assumptions and must consider potential reasonable accommodations. Generalized fears about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify an individual with a disability. For example, a law firm could not reject an applicant with a history of disabling mental illness based on a generalized fear that the stress of trying to make partner might trigger a relapse of the individual's mental illness. Nor can generalized fears about risks to individuals with disabilities in the event of an evacuation or other emergency be used by an employer to disqualify an individual with a disability. See Senate Report at 56; House Labor Report at 73–74; House Judiciary Report at 45. See also *Montalvo* v. *Bolger*, 767 F.2d 1418 (9th Cir. 1985); *Bentivegna* v. *U.S. Department of Labor*, 694 F.2d 619 (9th Cir. 1982).

Section 1630.3 Exceptions to the Definitions of 'Disability' and 'Qualified Individual with a Disability'

Section 1630.3 (a) through (c) Illegal Use of Drugs

Part 1630 provides that an individual currently engaging in the illegal use of drugs is not an individual with a disability for purposes of this part when the employer or other covered entity acts on the basis of such use. Illegal use of drugs refers both to the use of unlawful drugs, such as cocaine, and to the unlawful use of prescription drugs.

Employers, for example, may discharge or deny employment to persons who illegally use drugs, on the basis of such use, without fear of being held liable for discrimination. The term 'currently engaging' is not intended

to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct. See Conference Report at 64.

Individuals who are erroneously perceived as engaging in the illegal use of drugs, but are not in fact illegally using drugs are not excluded from the definitions of the terms "disability" and "qualified individual with a disability." Individuals who are no longer illegally using drugs and who have either been rehabilitated successfully or are in the process of completing a rehabilitation program are, likewise, not excluded from the definitions of those terms. The term "rehabilitation program" refers to both in-patient and out-patient programs, as well as to appropriate employee assistance programs, professionally recognized self-help programs, such as Narcotics Anonymous, or other programs that provide professional (not necessarily medical) assistance and counseling for individuals who illegally use drugs. See Conference Report at 64; see also House Labor Report at 77; House Judiciary Report at 47.

It should be noted that this provision simply provides that certain individuals are not excluded from the definitions of "disability" and "qualified individual with a disability." Consequently, such individuals are still required to establish that they satisfy the requirements of these definitions in order to be protected by the ADA and this part. An individual erroneously regarded as illegally using drugs, for example, would have to show that he or she was regarded as a drug addict in order to demonstrate that he or she meets the definition of "disability" as defined in this part.

Employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem. The reasonable assurances that employers may ask applicants or employees to provide include evidence that the individual is participating in a drug treatment program and/or evidence, such as drug test results, to show that the individual is not currently engaging in the illegal use of drugs. An employer, such as a law enforcement agency, may also be able to impose a qualification standard that excludes individuals with a history of illegal use of drugs if it can show that the standard is job-related and consistent with business necessity. (See § 1630.10 Qualification Standards, Tests and Other Selection Criteria) See Conference Report at 64.

Section 1630.4 Discrimination Prohibited

This provision prohibits discrimination against a qualified individual with a disability in all aspects of the employment relationship. The range of employment decisions covered by this nondiscrimination mandate is to be construed in a manner consistent with the regulations implementing section 504 of the Rehabilitation Act of 1973.

Part 1630 is not intended to limit the ability of covered entities to choose and maintain a qualified workforce. Employers can continue to use job-related criteria to select qualified employees, and can continue to hire employees who can perform the essential functions of the job.

Section 1630.5 Limiting, Segregating and Classifying.

This provision and the several provisions that follow describe various specific forms of discrimination that are included within the general prohibition of § 1630.4. Covered entities are prohibited from restricting the employment opportunities of qualified individuals with disabilities on the basis of stereotypes and myths about the individual's disability. Rather, the capabilities of qualified individuals with disabilities must be determined on an individualized, case by case basis. Covered entities are also prohibited from segregating qualified employees with disabilities into separate work areas or into separate lines of advancement.

Thus, for example, it would be a violation of this part for an employer to limit the duties of an employee with a disability based on a presumption of what is best for an individual with such a disability, or on a presumption about the abilities of an individual with such a disability. It would be a violation of this part for an employer to adopt a separate track of job promotion or progression for employees with disabilities based on a presumption that employees with disabilities are uninterested in, or incapable of, performing particular jobs. Similarly, it would be a violation for an employer to assign or reassign (as a reasonable accommodation) employees with disabilities to one particular office or installation, or to require that employees with disabilities only use particular employer provided non-work facilities such as segregated break-rooms, lunch rooms, or lounges. It would also be a violation of this part to deny employment to an applicant or employee with a disability based on generalized fears about the safety of an individual with such a disability, or based on generalized assumptions about the absenteeism rate of an individual with such a disability.

In addition, it should also be noted that this part is intended to require that employees with disabilities be accorded equal access to whatever health insurance coverage the employer provides to other employees. This part does not, however, affect pre-existing condition clauses included in health insurance policies offered by employers. Consequently, employers may continue to offer policies that contain such clauses, even if they adversely affect individuals with disabilities, so long as the clauses are not used as a subterfuge to evade the purposes of this part.

So, for example, it would be permissible for an employer to offer an insurance policy that limits coverage for certain procedures or treatments to a specified number per year. Thus, if a health insurance plan provided coverage for five blood transfusions a year to all covered employees, it would not be discriminatory to offer this plan simply because a hemophiliac employee may require more than five blood transfusions annually. However, it would not be permissible to limit or deny the hemophiliac employee coverage for other procedures, such as heart surgery or the setting of a broken leg, even though the plan would not have to provide coverage for the additional blood transfusions that may be involved in these procedures. Likewise, limits may be placed on reimbursements for certain procedures or on the types of drugs or procedures covered (e.g. limits on the number of permitted X-rays or non-coverage of experimental drugs or procedures), but that limitation must be applied equally to individuals with and without disabilities. See Senate Report at 28–29; House Labor Report at 58–59; House Judiciary Report at 36.

Leave policies or benefit plans that are uniformly applied do not violate this part simply because they do not address the special needs of every individual with a disability. Thus, for example, an employer that reduces the number of paid sick leave days that it will provide to all employees, or reduces the amount of medical insurance coverage that it will provide to all employees, is not in violation of this part, even if the benefits reduction has an impact on employees with disabilities in need of greater sick leave and medical coverage. Benefits reductions adopted for discriminatory reasons are in violation of this part. See *Alexander* v. *Choate*, 469 U.S. 287 (1985); See Senate Report at 85; House Labor Report at 137. (See also, the discussion at § 1630.16(f) Health Insurance, Life Insurance, and Other Benefit Plans).

Section 1630.6 Contractual or Other Arrangements.

An employer or other covered entity may not do through a contractual or other relationship what it is prohibited from doing directly. This provision does not affect the determination of whether or not one is a "covered entity" or "employer" as defined in § 1630.2.

This provision only applies to situations where an employer or other covered entity has entered into a contractual relationship that has the effect of discriminating against its own employees or applicants with disabilities. Accordingly, it would be a violation for an employer to participate in a contractual relationship that results in discrimination against the employer's employees with disabilities in hiring, training, promotion, or in any other aspect of the employment relationship. This provision applies whether or not the employer or other covered entity intended for the contractual relationship to have the discriminatory effect.

Part 1630 notes that this provision applies to parties on either side of the contractual or other relationship. This is intended to highlight that an employer whose employees provide services to others, like an employer whose employees receive services, must ensure that those employees are not discriminated against on the basis of disability. For example, a copier company whose service representative is a dwarf could be required to provide a stepstool, as a reasonable accommodation, to enable him to perform the necessary repairs. However, the employer would not be required, as a

reasonable accommodation, to make structural changes to its customer's inaccessible premises.

The existence of the contractual relationship adds no new obligations under part 1630. The employer, therefore, is not liable through the contractual arrangement for any discrimination by the contractor against the contractors own employees or applicants, although the contractor, as an employer, may be liable for such discrimination.

An employer or other covered entity, on the other hand, cannot evade the obligations imposed by this part by engaging in a contractual or other relationship. For example, an employer cannot avoid its responsibility to make reasonable accommodation subject to the undue hardship limitation through a contractual arrangement. See Conference Report at 56; House Labor Report at 59–61; House Judiciary Report at 39–37.

To illustrate, assume that an employer is seeking to contract with a company to provide training for its employees. Any responsibilities of reasonable accommodation applicable to the employer in providing the training remain with that employer even if it contracts with another company for this service. Thus, if the training company were planning to conduct the training at an inaccessible location, thereby making it impossible for an employee who uses a wheelchair to attend, the employer would have a duty to make reasonable accommodation unless to do so would impose an undue hardship. Under those circumstances, appropriate accommodations might include: (1) having the training company identify accessible training sites and relocate the training program; (2) having the training company make the training site accessible; (3) directly making the training site accessible or providing the training company with the means by which to make the site accessible; (4) identifying and contracting with another training company that uses accessible sites; or (5) any other accommodation that would result in making the training available to the employee.

As another illustration, assume that instead of contracting with a training company, the employer contracts with a hotel to host a conference for its employees. The employer will have a duty to ascertain and ensure the accessibility of the hotel and its conference facilities. To fulfill this obligation the employer could, for example, inspect the hotel first-hand or ask a local disability group to inspect the hotel. Alternatively, the employer could ensure that the contract with the hotel specifies it will provide accessible guest rooms for those who need them and that all rooms to be used for the conference, including exhibit and meeting rooms, are accessible. If the hotel breaches this accessibility provision, the hotel may be liable to the employer, under a non-ADA breach of contract theory, for the cost of any accommodation needed to provide access to the hotel and conference, and for any other costs accrued by the employer. (In addition, the hotel may also be independently liable under title III of the ADA). However, this would not relieve the employer of its responsibility under this part nor shield it from charges of discrimination by its own employees. See House Labor Report at 60; House Judiciary Report at 37.

Section 1630.6 Relationship or Association With an Individual With a Disability

This provision is intended to protect any qualified individual, whether or not that individual has a disability, from discrimination because that person is known to have an association or relationship with an individual who has a known disability. This protection is not limited to those who have a familial relationship with an individual with a disability.

To illustrate the scope of this provision, assume that a qualified applicant without a disability applies for a job and discloses to the employer that his or her spouse has a disability. The employer thereupon declines to hire the applicant because the employer believes that the applicant would have to miss work or frequently leave work early in order to care for the spouse. Such a refusal to hire would be prohibited by this provision. Similarly, this provision would prohibit an employer from discharging an employee because the employee does volunteer work with people who have AIDS, and the employer fears that the employee may contract the disease.

This provision also applies to other benefits and privileges of employment. For example, an employer that provides health insurance benefits to its employees for their dependents may not reduce the level of those benefits to an employee simply because that employee has a dependent with a disability. This is true even if the provision of such benefits would result in increased health insurance costs for the employer.

It should be noted, however, that an employer need not provide the applicant or employee without a disability with a reasonable accommodation because that duty only applies to qualified applicants or employees with disabilities. Thus, for example, an employee would not be entitled to a modified work schedule as an accommodation to enable the employee to care for a spouse with a disability. See Senate Report at 30; House Labor Report at 61–62; House Judiciary Report at 30–39.

Section 1630.9 Not Making Reasonable Accommodation

The obligation to make reasonable accommodation is a form of non-discrimination. It applies to all employment decisions and to the job application process. This obligation does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability. Thus, if an adjustment or modification is job-related, *e.g.*, specifically assists the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation. On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide. Accordingly, an employer would generally not be required to provide an employee with a disability with a prosthetic limb, wheelchair, or eyeglasses. Nor would an employer have to provide as an accommodation any amenity or convenience that is not job-related, such as a private hot plate, hot pot or refrigerator that is not provided to employees without disabilities. See Senate Report at 31; House Labor Report at 62.

It should be noted, however, that the provision of such items may be required as a reasonable accommodation where such items are specifically designed or required to meet job-related rather than personal needs. An employer, for example, may have to provide an individual with a disabling visual impairment with eyeglasses specifically designed to enable the individual to use the office computer monitors, but that are not otherwise needed by the individual outside of the office.

The term "supported employment," which has been applied to a wide variety of programs to assist individuals with severe disabilities in both competitive and non-competitive employment, is not synonymous with reasonable accommodation. Examples of supported employment include modified training materials, restructuring essential functions to enable an individual to perform a job, or hiring an outside professional ("job coach") to assist in job training. Whether a particular form of assistance would be required as a reasonable accommodation must be determined on an individualized, case by case basis without regard to whether that assistance is referred to as "supported employment." For example, an employer, under certain circumstances, may be required to provide modified training materials or a temporary "job coach" to assist in the training of a qualified individual with a disability as a reasonable accommodation. However, an employer would not be required to restructure the essential functions of a position to fit the skills of an individual with a disability who is not otherwise qualified to perform the position, as is done in certain supported employment programs. See 34 CFR part 363. It should be noted that it would not be a violation of this part for an employer to provide any of these personal modifications or adjustments, or to engage in supported employment or similar rehabilitative programs.

The obligation to make reasonable accommodation applies to all services and programs provided in connection with employment, and to all non-work facilities provided or maintained by an employer for use by its employees. Accordingly, the obligation to accommodate is applicable to employer sponsored placement or counseling services, and to employer provided cafeterias, lounges, gymnasiums, auditoriums, transportation and the like.

The reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated. These barriers may, for example, be physical or structural obstacles that inhibit or prevent the access of an individual with a disability to job sites, facilities or equipment. Or they may be rigid

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work schedules that permit no flexibility as to when work is performed or when breaks may be taken, or inflexible job procedures that unduly limit the modes of communication that are used on the job, or the way in which particular tasks are accomplished.

The term "otherwise qualified" is intended to make clear that the obligation to make reasonable accommodation is owed only to an individual with a disability who is qualified within the meaning of § 1630.2(m) in that he or she satisfies all the skill, experience, education and other job-related selection criteria. An individual with a disability is "otherwise qualified," in other words, if he or she is qualified for a job, except that, because of the disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions.

For example, if a law firm requires that all incoming lawyers have graduated from an accredited law school and have passed the bar examination, the law firm need not provide an accommodation to an individual with a visual impairment who has not met these selection criteria. That individual is not entitled to a reasonable accommodation because the individual is not "otherwise qualified" for the position.

On the other hand, if the individual has graduated from an accredited law school and passed the bar examination, the individual would be "otherwise qualified." The law firm would thus be required to provide a reasonable accommodation, such as a machine that magnifies print, to enable the individual to perform the essential functions of the attorney position, unless the necessary accommodation would impose an undue hardship on the law firm. See Senate Report at 33–34; House Labor Report at 56–68.

The reasonable accommodation that is required by this part should provide the qualified individual with a disability with an equal employment opportunity. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability. Thus, for example, an accommodation made to assist an employee with a disability in the performance of his or her job must be adequate to enable the individual to perform the essential functions of the relevant position. The accommodation, however, does not have to be the "best" accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated. Accordingly, an employer would not have to provide an employee disabled by a back impairment with a state-of-the art mechanical lifting device if it provided the employee with a less expensive or more readily available device that enabled the employee to perform the essential functions of the job. See Senate Report at 35; House Labor Report at 66; see also *Carter v. Bennett*, 840 F.2d 63 (DC Cir. 1988).

Employers are obligated to make reasonable accommodation only to the physical or mental limitations resulting from the disability of a qualified individual with a disability that is known to the employer. Thus, an employer would not be expected to accommodate disabilities of which it is unaware. If an employee with a known disability is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation. In general, however, it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed. When the need for an accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual with a disability provide documentation of the need for accommodation.

See Senate Report at 34; House Labor Report at 65.

Process of Determining the Appropriate Reasonable Accommodation

Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability. Although this process is described below in terms of accommodations that enable the individual with a disability to perform the essential functions of the position held or desired, it is equally applicable to accommodations involving the job application process, and to accommodations that enable the individual with a disability to enjoy equal benefits and privileges of employment. See Senate Report at 34–35; House Labor Report at 65–67.

When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

(1) Analyze the particular job involved and determine its purpose and essential functions;

(2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;

(3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

In many instances, the appropriate reasonable accommodation may be so obvious to either or both the employer and the qualified individual with a disability that it may not be necessary to proceed in this step-by-step fashion. For example, if an employee who uses a wheelchair requests that his or her desk be placed on blocks to elevate the desktop above the arms of the wheelchair and the employer complies, an appropriate accommodation has been requested, identified, and provided without either the employee or employer being aware of having engaged in any sort of "reasonable accommodation process."

However, in some instances neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation. For example, the individual needing the accommodation may not know enough about the equipment used by the employer or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the employer may not know enough about the individual's disability or the limitations that disability would impose on the performance of the job to suggest an appropriate accommodation. Under such circumstances, it may be necessary for the employer to initiate a more defined problem solving process, such as the step-by-step process described above, as part of its reasonable effort to identify the appropriate reasonable accommodation.

This process requires the individual assessment of both the particular job at issue, and the specific physical or mental limitations of the particular individual in need of reasonable accommodation. With regard to assessment of the job, "individual assessment" means analyzing the actual job duties and determining the true purpose or object of the job. Such an assessment is necessary to ascertain which job functions are the essential functions that an accommodation must enable an individual with a disability to perform.

After assessing the relevant job, the employer, in consultation with the individual requesting the accommodation, should make an assessment of the specific limitations imposed by the disability on the individual's performance of the job's essential functions. This assessment will make it possible to ascertain the precise barrier to the employment opportunity which, in turn, will make it possible to determine the accommodation(s) that could alleviate or remove that barrier.

If consultation with the individual in need of the accommodation still does not reveal potential appropriate accommodations, then the employer, as part of this process, may find that technical assistance is helpful in determining how to accommodate the particular individual in the specific situation. Such assistance could be sought from the Commission, from state or local rehabilitation agencies, or from disability constituent organizations. It should be noted, however, that, as provided in § 1630.9(c) of this part, the failure to obtain or receive technical assistance from the federal agencies that administer the ADA will not excuse the employer from its reasonable accommodation obligation.

Once potential accommodations have been identified, the employer should assess the effectiveness of each potential accommodation in assisting the individual in need of the accommodation in the performance of the essential functions of the position. If more than one of these accommodations will enable the individual to perform the essential functions or if the individual would prefer to provide his or her own accommodation, the preference of the individual with a disability should be given

primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide. It should also be noted that the individual's willingness to provide his or her own accommodation does not relieve the employer of the duty to provide the accommodation should the individual for any reason be unable or unwilling to continue to provide the accommodation.

Reasonable Accommodation Process Illustrated

The following example illustrates the informal reasonable accommodation process. Suppose a Sack Handler position requires that the employee pick up fifty pound sacks and carry them from the company loading dock to the storage room, and that a sack handler who is disabled by a back impairment requests a reasonable accommodation. Upon receiving the request, the employer analyzes the Sack Handler job and determines that the essential function and purpose of the job is not the requirement that the job holder physically lift and carry the sacks, but the requirement that the job holder cause the sack to move from the loading dock to the storage room.

The employer then meets with the sack handler to ascertain precisely the barrier posed by the individual's specific disability to the performance of the job's essential function of relocating the sacks. At this meeting the employer learns that the individual can, in fact, lift the sacks to waist level, but is prevented by his or her disability from carrying the sacks from the loading dock to the storage room. The employer and the individual agree that any of a number of potential accommodations, such as the provision of a dolly, hand truck, or cart, could enable the individual to transport the sacks that he or she has lifted.

Upon further consideration, however, it is determined that the provision of a cart is not a feasible effective option. No carts are currently available at the company, and those that can be purchased by the company are the wrong shape to hold many of the bulky and irregularly shaped sacks that must be moved. Both the dolly and the hand truck, on the other hand, appear to be effective options. Both are readily available to the company, and either will enable the individual to relocate the sacks that he or she has lifted. The sack handler indicates his or her preference for the dolly. In consideration of this expressed preference, and because the employer feels that the dolly will allow the individual to move more sacks at a time and so be more efficient than would a hand truck, the employer ultimately provides the sack handler with a dolly in fulfillment of the obligation to make reasonable accommodation.

Section 1630.9(b)

This provision states that an employer or other covered entity cannot prefer or select a qualified individual without a disability over an equally qualified individual with a disability merely because the individual with a disability will require a reasonable accommodation. In other words, an individual's need for an accommodation cannot enter into the employer's or other covered entity's decision regarding hiring, discharge, promotion, or other similar employment decisions, unless the accommodation would impose an undue hardship on the employer. See House Labor Report at 70.

Section 1630.9(d)

The purpose of this provision is to clarify that an employer or other covered entity may not compel a qualified individual with a disability to accept an accommodation, where that accommodation is neither requested nor needed by the individual. However, if a necessary reasonable accommodation is refused, the individual may not be considered qualified. For example, an individual with a visual impairment that restricts his or her field of vision but who is able to read unaided would not be required to accept a reader as an accommodation. However, if the individual were not able to read unaided and reading was an essential function of the job, the individual would not be qualified for the job if he or she refused a reasonable accommodation that would enable him or her to read. See Senate Report at 34; House Labor Report at 63; House Judiciary Report at 71–72.

Section 1630.10 Qualification Standards, Tests, and Other Selection Criteria

The purpose of this provision is to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job. It is to ensure that there is a fit between job criteria and an applicant's (or employee's) actual ability to do the job. Accordingly, job criteria that even unintentionally screen out, or tend to screen out, an individual with a disability or a class of individuals with disabilities because of their disability may not be used unless the employer demonstrates that that criteria, as used by the employer, are job related to the position to which they are being applied and are consistent with business necessity. The concept of "business necessity" has the same meaning as the concept of "business necessity" under section 504 of the Rehabilitation Act of 1973.

Selection criteria that exclude, or tend to exclude, an individual with a disability or a class of individuals with disabilities because of their disability but do not concern an essential function of the job would not be consistent with business necessity.

The use of selection criteria that are related to an essential function of the job may be consistent with business necessity. However, selection criteria that are related to an essential function of the job may not be used to exclude an individual with a disability if that individual could satisfy the criteria with the provision of a reasonable accommodation. Experience under a similar provision of the regulations implementing section 504 of the Rehabilitation Act indicates that challenges to selection criteria are, in fact, most often resolved by reasonable accommodation. It is therefore anticipated that challenges to selection criteria brought under this part will generally be resolved in a like manner.

This provision is applicable to all types of selection criteria, including safety requirements, vision or hearing requirements, walking requirements, lifting requirements, and employment tests. See Senate Report at 37–39; House Labor Report at 70–72; House Judiciary Report at 42. As previously noted, however, it is not the intent of this part to second guess an employer's business judgment with regard to production standards. (See section 1630.2(n) Essential Functions). Consequently, production standards will generally not be subject to a challenge under this provision.

The Uniform Guidelines on Employee Selection Procedures (UGESP) 29 CFR part 1607 do not apply to the Rehabilitation Act and are similarly inapplicable to this part.

Section 1630.11 Administration of Tests

The intent of this provision is to further emphasize that individuals with disabilities are not to be excluded from jobs that they can actually perform merely because a disability prevents them from taking a test, or negatively influences the results of a test, that is a prerequisite to the job. Read together with the reasonable accommodation requirement of section 1630.9, this provision requires that employment tests be administered to eligible applicants or employees with disabilities that impair sensory, manual, or speaking skills in formats that do not require the use of the impaired skill.

The employer or other covered entity is, generally, only required to provide such reasonable accommodation if it knows, prior to the administration of the test, that the individual is disabled and that the disability impairs sensory, manual or speaking skills. Thus, for example, it would be unlawful to administer a written employment test to an individual who has informed the employer, prior to the administration of the test, that he is disabled with dyslexia and unable to read. In such a case, as a reasonable accommodation and in accordance with this provision, an alternative oral test should be administered to that individual. By the same token, a written test may need to be substituted for an oral test if the applicant taking the test is an individual with a disability that impairs speaking skills or impairs the processing of auditory information.

Occasionally, an individual with a disability may not realize, prior to the administration of a test, that he or she will need an accommodation to take that particular test. In such a situation, the individual with a disability, upon becoming aware of the need for an accommodation, must so inform the employer or other covered entity. For example, suppose an individual with a disabling visual impairment does not request an accommodation for a written examination because he or she is usually able to take written tests with the aid of his or her own specially designed lens. When the test is distributed, the individual with a disability discovers that the lens is insufficient to distinguish the words of the test because of the unusually low color contrast between the paper and the ink, the

individual would be entitled, at that point, to request an accommodation. The employer or other covered entity would, thereupon, have to provide a test with higher contrast, schedule a retest, or provide any other effective accommodation unless to do so would impose an undue hardship.

Other alternative or accessible test modes or formats include the administration of tests in large print or braille, or via a reader or sign interpreter. Where it is not possible to test in an alternative format, the employer may be required, as a reasonable accommodation, to evaluate the skill to be tested in another manner (e.g., through an interview, or through education license, or work experience requirements). An employer may also be required, as a reasonable accommodation, to allow more time to complete the test. In addition, the employer's obligation to make reasonable accommodation extends to ensuring that the test site is accessible. [See § 1630.9 Not Making Reasonable Accommodation] See Senate Report at 37–38; House Labor Report at 70–72; House Judiciary Report at 42; see also *Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983); *Crane v. Dole*, 617 F. Supp. 156 (D.D.C. 1985).

This provision does not require that an employer offer every applicant his or her choice of test format. Rather, this provision only requires that an employer provide, upon advance request, alternative, accessible tests to individuals with disabilities that impair sensory, manual, or speaking skills needed to take the test.

This provision does not apply to employment tests that require the use of sensory, manual, or speaking skills where the tests are intended to measure those skills. Thus, an employer could require that an applicant with dyslexia take a written test for a particular position if the ability to read is the skill the test is designed to measure. Similarly, an employer could require that an applicant complete a test within established time frames if speed were one of the skills for which the applicant was being tested. However, the results of such a test could not be used to exclude an individual with a disability unless the skill was necessary to perform an essential function of the position and no reasonable accommodation was available to enable the individual to perform that function, or the necessary accommodation would impose an undue hardship.

Section 1630.13 Prohibited Medical Examinations and Inquiries

Section 1630.13(a) Pre-employment Examination or Inquiry

This provision makes clear that an employer cannot inquire as to whether an individual has a disability at the pre-offer stage of the selection process. Nor can an employer inquire at the pre-offer stage about an applicant's workers' compensation history.

Employers may ask questions that relate to the applicant's ability to perform job-related functions. However, these questions should not be phrased in terms of disability. An employer, for example, may ask whether the applicant has a driver's license, if driving is a job function, but may not ask whether the applicant has a visual disability. Employers may ask about an applicant's ability to perform both essential and marginal job functions. Employers, though, may not refuse to hire an applicant with a disability because the applicant's disability prevents him or her from performing marginal functions. See Senate Report at 38; House Labor Report at 72–73; House Judiciary Report at 42–43.

Section 1630.13(b) Examination or Inquiry of Employees

The purpose of this provision is to prevent the administration to employees of medical tests or inquiries that do not serve a legitimate business purpose. For example, if an employee suddenly starts to use increased amounts of sick leave or starts to appear sickly, an employer could not require that employee to be tested for AIDS, HIV infection, or cancer unless the employer can demonstrate that such testing is job-related and consistent with business necessity. See Senate Report at 39; House Labor Report at 73; House Judiciary Report at 44.

Section 1630.14 Medical Examinations and Inquiries Specifically Permitted

Section 1630.14(a) Pre-employment Inquiry

Employers are permitted to make pre-employment inquiries into the ability of an applicant to perform job-related functions. This inquiry must be narrowly tailored. The employer may describe or demonstrate the job function and inquire whether or not the applicant can perform that function with or without reasonable accommodation. For example, an employer may explain that the job requires assembling small parts and ask if the individual will be able to perform that function, with or without reasonable accommodation. See Senate Report at 39; House Labor Report at 73; House Judiciary Report at 43.

An employer may also ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions. Such a request may be made of all applicants in the same job category regardless of disability. Such a request may also be made of an applicant whose known disability may interfere with or prevent the performance of a job-related function, whether or not the employer routinely makes such a request of all applicants in the job category. For example, an employer may ask an individual with one leg who applies for a position as a home washing machine repairman to demonstrate or to explain how, with or without reasonable accommodation, he would be able to transport himself and his tools down basement stairs. However, the employer may not inquire as to the nature or severity of the disability. Therefore, for example, the employer cannot ask how the individual lost the leg or whether the loss of the leg is indicative of an underlying impairment.

On the other hand, if the known disability of an applicant will not interfere with or prevent the performance of a job-related function, the employer may only request a description or demonstration by the applicant if it routinely makes such a request of all applicants in the same job category. So, for example, it would not be permitted for an employer to request that an applicant with one leg demonstrate his ability to assemble small parts while seated at a table, if the employer does not routinely request that all applicants provide such a demonstration.

An employer that requires an applicant with a disability to demonstrate how he or she will perform a job-related function must either provide the reasonable accommodation the applicant needs to perform the function or permit the applicant to explain how, with the accommodation, he or she will perform the function. If the job-related function is not an essential function, the employer may not exclude the applicant with a disability because of the applicant's inability to perform that function. Rather, the employer must, as a reasonable accommodation, either provide an accommodation that will enable the individual to perform the function, transfer the function to another position, or exchange the function for one the applicant is able to perform.

An employer may not use an application form that lists a number of potentially disabling impairments and ask the applicant to check any of the impairments he or she may have. In addition, as noted above, an employer may not ask how a particular individual became disabled or the prognosis of the individual's disability. The employer is also prohibited from asking how often the individual will require leave for treatment or use leave as a result of incapacitation because of the disability. However, the employer may state the attendance requirements of the job and inquire whether the applicant can meet them.

An employer is permitted to ask, on a test announcement or application form, that individuals with disabilities who will require a reasonable accommodation in order to take the test so inform the employer within a reasonable established time period prior to the administration of the test. The employer may also request that documentation of the need for the accommodation accompany the request. Requested accommodations may include accessible testing sites, modified testing conditions and accessible test formats. [See § 1630.11 Administration of Tests].

Physical agility tests are not medical examinations and so may be given at any point in the application or employment process. Such tests must be given to all similarly situated applicants or employees regardless of disability. If such tests screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, the employer would have to demonstrate that the test is job-related and consistent with business necessity and that performance cannot be achieved with reasonable accommodation. [See § 1630.9 Not Making Reasonable Accommodation, Process of Determining the Appropriate Reasonable Accommodation].

As previously noted, collecting information and inviting individuals to identify themselves as individuals with disabilities as required to satisfy the affirmative action requirements of Section 503 of the Rehabilitation Act is not restricted by this

part. (See § 1630.1 (b) and (c) Applicability and Construction)

Section 1630.14(b) Employment Entrance Examination

An employer is permitted to require post-offer medical examinations before the employee actually starts working. The employer may condition the offer of employment on the results of the examination, provided that all entering employees in the same job category are subjected to such an examination, regardless of disability, and that the confidentiality requirements specified in this part are met.

This provision recognizes that in many industries, such as air transportation or construction, applicants for certain positions are chosen on the basis of many factors including physical and psychological criteria, some of which may be identified as a result of post-offer medical examinations given prior to entry on duty. Only those employees who meet the employer's physical and psychological criteria for the job, with or without reasonable accommodation, will be qualified to receive confirmed offers of employment and begin working.

Medical examinations permitted by this section are not required to be job-related and consistent with business necessity. However if an employer withdraws an offer of employment because the medical examination reveals that the employee does not satisfy certain employment criteria, either the exclusionary criteria must not screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, or they must be job-related and consistent with business necessity. As part of the showing that an exclusionary criteria is job-related and consistent with business necessity, the employer must also demonstrate that there is no reasonable accommodation that will enable the individual with a disability to perform the essential functions of the job. See Conference Report at 59–60; Senate Report at 39; House Labor Report at 73–74; House Judiciary Report at 43.

As an example, suppose an employer makes a conditional offer of employment to an applicant, and it is an essential function of the job that the incumbent be available to work every day for the next three months. An employment entrance examination then reveals that the applicant has a disabling impairment that, according to reasonable medical judgment that relies on the most current medical knowledge, will require treatment that will render the applicant unable to work for a portion of the three month period. Under these circumstances, the employer would be able to withdraw the employment offer without violating this part.

The information obtained in the course of a permitted entrance examination or inquiry is to be treated as a confidential medical record and may only be used in a manner not inconsistent with this part. State workers' compensation laws are not preempted by the ADA or this part. These laws require the collection of information from individuals for state administrative purposes that do not conflict with the ADA or this part. Consequently, employers or other covered entities may submit information to state workers' compensation offices or second injury funds in accordance with state workers' compensation laws without violating this part.

Consistent with this section and with § 1630.16(f) of this part, information obtained in the course of a permitted entrance examination or inquiry may be used for insurance purposes described in § 1630.16(f).

Section 1630.14(c) Examination of Employees

This provision permits employers to make inquiries or require medical examinations (fitness for duty exams) when there is a need to determine whether an employee is still able to perform the essential functions of his or her job. The provision permits employers or other covered entities to make inquiries or require medical examinations necessary to the reasonable accommodation process described in this part. This provision also permits periodic physicals to determine fitness for duty or other medical monitoring if such physicals or monitoring are required by medical standards or requirements established by Federal, state, or local law that are consistent with the ADA and this part (or in the case of a federal standard, with section 504 of the Rehabilitation Act) in that they are job-related and consistent with business necessity.

Such standards may include federal safety regulations that regulate bus and truck driver qualifications, as well as laws establishing medical requirements for pilots or other air transportation personnel. These standards also include health standards promulgated pursuant to the Occupational Safety and Health Act of 1970, the Federal Coal Mine Health and Safety Act of 1969, or other similar statutes that require that employees exposed to certain toxic and hazardous substances be medically monitored at specific intervals. See House Labor Report at 74–75.

The information obtained in the course of such examination or inquiries is to be treated as a confidential medical record and may only be used in a manner not inconsistent with this part.

Section 1630.14(d) Other Acceptable Examinations and Inquiries

Part 1630 permits voluntary medical examinations, including voluntary medical histories, as part of employee health programs. Those programs often include, for example, medical screening for high blood pressure, weight control counseling, and cancer detection. Voluntary activities, such as blood pressure monitoring and the administering of prescription drugs, such as insulin, are also permitted. It should be noted, however, that the medical records developed in the course of such activities must be maintained in the confidential manner required by this part and must not be used for any purpose in violation of this part, such as limiting health insurance eligibility. House Labor Report at 73; House Judiciary Report at 43–44.

Section 1630.15 Defenses

The section on defenses in part 1630 is not intended to be exhaustive. However, it is intended to inform employers of some of the potential defenses available to a charge of discrimination under the ADA and this part.

Section 1630.15(a) Disparate Treatment Defenses

The "traditional" defense to a charge of disparate treatment under title VII, as expressed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and their progeny, may be applicable to charges of disparate treatment brought under the ADA. See *Prewitt v. U.S. Postal Service*, 662 F.2d 292 (5th Cir. 1981). Disparate treatment means, with respect to title I of the ADA, that an individual was treated differently on the basis of his or her disability. For example, disparate treatment has occurred where an employer excludes an employee with a severe facial disfigurement from staff meetings because the employer does not like to look at the employee. The individual is being treated differently because of the employer's attitude towards his or her perceived disability. Disparate treatment has also occurred where an employer has a policy of not hiring individuals with AIDS regardless of the individuals' qualifications.

The crux of the defense to this type of charge is that the individual was treated differently not because of his or her disability but for a legitimate nondiscriminatory reason such as poor performance unrelated to the individual's disability. The fact that the individual's disability is not covered by the employer's current insurance plan or would cause the employer's insurance premiums or workers' compensation costs to increase would not be a legitimate nondiscriminatory reason justifying disparate treatment of an individual with a disability. Senate Report at 28; House Labor Report at 136 and House Judiciary Report at 70. The defense of a legitimate nondiscriminatory reason is rebutted if the alleged nondiscriminatory reason is shown to be pretextual.

Section 1630.15 (b) and (c) Disparate Impact Defenses

Disparate impact means, with respect to title I of the ADA and this part, that uniformly applied criteria have an adverse impact on an individual with a disability or a disproportionately negative impact on a class of individuals with disabilities. Section 1630.15(b) clarifies that an employer may use selection criteria that have such a disparate impact, *i.e.*, that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities only when they are job-related and consistent with business necessity.

For example, an employer interviews two candidates for a position, one of whom is blind. Both are equally qualified. The employer decides that while it is not essential to the job it would be convenient to have an employee who has a driver's license and so could occasionally be asked to run errands by car. The employer hires the individual who is sighted because this individual has a driver's license. This is an example of a uniformly applied criterion, having a driver's permit, that screens out an individual who

has a disability that makes it impossible to obtain a driver's permit. The employer would, thus, have to show that this criterion is job-related and consistent with business necessity. See House Labor Report at 55.

However, even if the criterion is job-related and consistent with business necessity, an employer could not exclude an individual with a disability if the criterion could be met or job performance accomplished with a reasonable accommodation. For example, suppose an employer requires, as part of its application process, an interview that is job-related and consistent with business necessity. The employer would not be able to refuse to have a hearing impaired applicant because he or she could not be interviewed. This is so because an interpreter could be provided as a reasonable accommodation that would allow the individual to be interviewed, and thus satisfy the selection criterion.

With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the "direct threat" standard in § 1630.2(r) in order to show that the requirement is job-related and consistent with business necessity.

Section 1630.15(c) clarifies that there may be uniformly applied standards, criteria and policies not relating to selection that may also screen out or tend to screen out an individual with a disability or a class of individuals with disabilities. Like selection criteria that have a disparate impact, non-selection criteria having such an impact may also have to be job-related and consistent with business necessity, subject to consideration of reasonable accommodation.

It should be noted, however, that some uniformly applied employment policies or practices, such as leave policies, are not subject to challenge under the adverse impact theory. "No-leave" policies (*e.g.*, no leave during the first six months of employment) are likewise not subject to challenge under the adverse impact theory. However, an employer, in spite of its "no-leave" policy, may, in appropriate circumstances, have to consider the provision of leave to an employee with a disability as a reasonable accommodation, unless the provision of leave would impose an undue hardship. See discussion at § 1630.5 Limiting, Segregating and Classifying, and § 1630.10 Qualification Standards, Tests, and Other Selection Criteria.

Section 1630.15(d) Defense to Not Making Reasonable Accommodation

An employer or other covered entity alleged to have discriminated because it did not make a reasonable accommodation, as required by this part, may offer as a defense that it would have been an undue hardship to make the accommodation.

It should be noted, however, that an employer cannot simply assert that a needed accommodation will cause it undue hardship, as defined in § 1630.2(p), and thereupon be relieved of the duty to provide accommodation. Rather, an employer will have to present evidence and demonstrate that the accommodation will, in fact, cause it undue hardship. Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case by case basis. Consequently, an accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time. Likewise, an accommodation that poses an undue hardship for one employer in a particular job setting, such as a temporary construction worksite, may not pose an undue hardship for another employer, or even for the same employer at a permanent worksite. See House Judiciary Report at 42.

The concept of undue hardship that has evolved under Section 504 of the Rehabilitation Act and is embodied in this part is unlike the "undue hardship" defense associated with the provision of religious accommodation under title VII of the Civil Rights Act of 1964. To demonstrate undue hardship pursuant to the ADA and this part, an employer must show substantially more difficulty or expense than would be needed to satisfy the "de minimis" title VII standard of undue hardship. For example, to demonstrate that the cost of an accommodation poses an undue hardship, an employer would have to show that the cost is undue as compared to the employer's budget. Simply comparing the cost of the accommodation to the salary of the individual with a disability in need of the accommodation will not suffice. Moreover, even if it is determined that the cost of an accommodation would unduly burden an employer, the employer cannot avoid making the accommodation if the individual with a disability can arrange to cover that portion of the cost that rises to the undue hardship level, or can otherwise arrange to provide the accommodation. Under such circumstances, the necessary accommodation would no longer pose an undue hardship. See Senate Report at 30, House Labor Report at 68–69, House Judiciary Report at 40–41.

Excessive cost is only one of several possible bases upon which an employer might be able to demonstrate undue hardship. Alternatively, for example, an employer could demonstrate that the provision of a particular accommodation would be unduly disruptive to its other employees or to the functioning of its business. The terms of a collective bargaining agreement may be relevant to this determination. By way of illustration, an employer would likely be able to show undue hardship if the employer could show that the requested accommodation of the upward adjustment of the business thermostat would result in it becoming unduly hot for its other employees, or for its patrons or customers. The employer would thus not have to provide this accommodation. However, if there were an alternate accommodation that would not result in undue hardship, the employer would have to provide that accommodation.

It should be noted, moreover, that the employer would not be able to show undue hardship if the disruption to its employees were the result of those employees fears or prejudices toward the individual's disability and not the result of the provision of the accommodation. Nor would the employer be able to demonstrate undue hardship by showing that the provision of the accommodation has a negative impact on the morale of its other employees but not on the ability of these employees to perform their jobs.

Section 1630.15(e) Defense—Conflicting Federal Laws and Regulations

There are several Federal laws and regulations that address medical standards and safety requirements. If the alleged discriminatory action was taken in compliance with another Federal law or regulation, the employer may offer its obligation to comply with the conflicting standard as a defense. The employer's defense of a conflicting Federal requirement or regulation may be rebutted by a showing of pretext, or by showing that the Federal standard did not require the discriminatory action, or that there was a nonexclusionary means to comply with the standard that would not conflict with this part. See House Labor Report at 74.

Section 1630.16 Specific Activities Permitted

Section 1630.16(a) Religious Entities

Religious organizations are not exempt from title I of the ADA or this part. A religious corporation, association, educational institution, or society may give a preference in employment to individuals of the particular religion, and may require that applicants and employees conform to the religious tenets of the organization. However, a religious organization may not discriminate against an individual who satisfies the permitted religious criteria because that individual is disabled. The religious entity, in other words, is required to consider qualified individuals with disabilities who satisfy the permitted religious criteria on an equal basis with qualified individuals without disabilities who similarly satisfy the religious criteria. See Senate Report at 62, House Labor Report at 76–77, House Judiciary Report at 66.

Section 1630.16(b) Regulation of Alcohol and Drugs

This provision permits employers to establish or comply with certain standards regulating the use of drugs and alcohol in the workplace. It also allows employers to hold alcoholics and persons who engage in the illegal use of drugs to the same performance and conduct standards to which it holds all of its other employees. Individuals disabled by alcoholism are entitled to the same protections accorded other individuals with disabilities under this part. As noted above, individuals currently engaging in the illegal use of drugs are not individuals with disabilities for purposes of part 1630 when the employer acts on the basis of such use.

Section 1630.16(c) Drug Testing

This provision reflects title I's neutrality toward testing for the illegal use of drugs. Such drug tests are neither encouraged, authorized nor prohibited. The results of such drug tests may be used as a basis for disciplinary action. Tests for the illegal use of

drugs are not considered medical examinations for purposes of this part. If the results reveal information about an individual's medical condition beyond whether the individual is currently engaging in the illegal use of drugs, this additional information is to be treated as a confidential medical record. For example, if a test for the illegal use of drugs reveals the presence of a controlled substance that has been lawfully prescribed for a particular medical condition, this information is to be treated as a confidential medical record. See House Labor Report at 79; House Judiciary Report at 47.

Section 1630.16(e) Infectious and Communicable Diseases: Food Handling Jobs

This provision addressing food handling jobs applies the "direct threat" analysis to the particular situation of accommodating individuals with infectious or communicable diseases that are transmitted through the handling of food. The Department of Health and Human Services is to prepare a list of infectious and communicable diseases that are transmitted through the handling of food. If an individual with a disability has one of the listed diseases and works in or applies for a position in food handling, the employer must determine whether there is a reasonable accommodation that will eliminate the risk of transmitting the disease through the handling of food. If there is an accommodation that will not pose an undue hardship, and that will prevent the transmission of the disease through the handling of food, the employer must provide the accommodation to the individual. The employer, under these circumstances, would not be permitted to discriminate against the individual because of the need to provide the reasonable accommodation and would be required to maintain the individual in the food handling job.

If no such reasonable accommodation is possible, the employer may refuse to assign, or to continue to assign the individual to a position involving food handling. This means that if such an individual is an applicant for a food handling position the employer is not required to hire the individual. However, if the individual is a current employee, the employer would be required to consider the accommodation of reassignment to a vacant position not involving food handling for which the individual is qualified. Conference Report at 61–63. (See § 1630.2[r] Direct Threat).

Section 1630.16(f) Health Insurance, Life Insurance, and Other Benefit Plans

This provision is a limited exemption that is only applicable to those who establish, sponsor, observe or administer benefit plans, such as health and life insurance plans. It does not apply to those who establish, sponsor, observe or administer plans not involving benefits, such as liability insurance plans.

The purpose of this provision is to permit the development and administration of benefit plans in accordance with accepted principles of risk assessment. This provision is not intended to disrupt the current regulatory structure for self-insured employers. These employers may establish, sponsor, observe, or administer the terms of a bona fide benefit plan not subject to state laws that regulate insurance. This provision is also not intended to disrupt the current nature of insurance underwriting, or current insurance industry practices in sales, underwriting, pricing, administrative and other services, claims and similar insurance related activities based on classification of risks as regulated by the States.

The activities permitted by this provision do not violate part 1630 even if they result in limitations on individuals with disabilities, provided that these activities are not used as a subterfuge to evade the purposes of this part. Whether or not these activities are being used as a subterfuge is to be determined without regard to the date the insurance plan or employee benefit plan was adopted.

However, an employer or other covered entity cannot deny a qualified individual with a disability equal access to insurance or subject a qualified individual with a disability to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks. Part 1630 requires that decisions not based on risk classification be made in conformity with non-discrimination requirements. See Senate Report at 84–86; House Labor Report at 136–138; House Judiciary Report at 70–71. See the discussion of § 1630.5 Limiting, Segregating and Classifying.

[FR Doc. 91–17512 Filed 7–25–91; 8:45 am]

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Parts 1602 and 1627

Recordkeeping and Reporting Under Title VII and the ADA

AGENCY: Equal Employment Opportunity Commission (EEOC).

ACTION: Final rule.

SUMMARY: This final rule is based on two separate Notices of Proposed Rulemaking (NPRM) published on February 13, 1989 (54 FR 6551), and March 5, 1991 (56 FR 9185). This final rule amends 29 CFR part 1602, EEOC's regulations on Recordkeeping and Reporting under title VII of the Civil Rights Act of 1964 (title VII), to add recordkeeping requirements under the Americans with Disabilities Act of 1990 (ADA). It increases the records retention period required in part 1602 for title VII and the ADA from 6 months to one year. The Commission also is adding a new subpart R to part 1602, 29 CFR 1602.56, that will clarify that the Commission has the authority to investigate persons to determine whether they comply with the reporting or recordkeeping requirements of part 1602. In addition, the Commission is making several minor changes to §§ 1602.7 and 1602.10.

The Commission also is deleting § 1602.14(b) of its title VII recordkeeping regulations, which provides that the § 1602 recordkeeping requirements do not apply to temporary or seasonal positions. Information regarding such employees now must be reported on Standard Form 100 on September 30 of each year, in the same fashion as information regarding permanent employees is reported. Similarly, the Commission is deleting §§ 1627.3(b) and 1627.4(a)(2) of the Age Discrimination in Employment Act recordkeeping regulations, which provide for a 90-day retention period for temporary positions, and is clarifying the mandatory nature of such recordkeeping. The Commission is not issuing a final rule on proposed § 1602.57 at this time.

EFFECTIVE DATE: August 26, 1991.

FOR FURTHER INFORMATION CONTACT: Thomas J. Schlageter, Acting Assistant Legal Counsel, Grace C. Karmiol, General Attorney, or Wendy Adams, General Attorney, at (202) 663–4669 (voice) or (202) 663–4399 (TDD).

SUPPLEMENTARY INFORMATION: The Commission received nine comments in response to the NPRM published in the March 5, 1991 **Federal Register** on Recordkeeping and Reporting under title VII and the ADA. The comments responded to the invitation in the preamble of the NPRM for comment on whether there should be a reporting requirement under the ADA, how the reported information should be used, and how it should be collected. Four comments recommended that there be a reporting requirement although one of them suggested that it be collected by sampling rather than universal reporting. Five comments opposed any new reporting requirements on the grounds of administrative burden. One of these suggested that no reporting requirement be imposed at this time, but that the need for reporting be reassessed at a later date. Another of these argued that if a reporting requirement is necessary, it should be accomplished by using the existing EEO–1 rather than a separate report, should be collected by both employer visual identification and employee self-identification, and should be used to monitor the impact of the ADA and to document utilization of persons with disabilities, not for affirmative action purposes. The Commission is continuing its consideration of possible reporting requirements under the ADA and will confer with the Department of Labor, and any other affected federal agency, to discuss whether a reporting requirement would be appropriate under

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the ADA. If it concludes that a reporting requirement may be appropriate, it will issue an NPRM.

The Commission received over 20 comments in response to the February 13, 1989 NPRM. While this preamble does not address each individual comment, it addresses the most significant issues raised in the comments. Current § 1602.7 concerns the filing of Standard Form 100, and has been interpreted in conjunction with the instructions accompanying the form. In order to clarify which of the employers that are subject to title VII must file the report, the Commission has incorporated some of the information that is contained in the instructions into § 1602.7.

Current § 1602.14 provides that personnel or employment records made or kept by an employer shall be preserved by the employer for a period of six months from the date of the making of the record or of the personnel action involved, whichever is later. This requirement was promulgated before title VII was amended in 1972 to change the time limit for filing a charge from 90 days to 180 days (or, in some instances, to 300 days). Requiring an employer or labor organization to maintain records for six months when the charge filing limit was 90 days ensured that all applicable records were kept. Due to the lengthening of the filing period, however, it no longer is true that employers or labor organizations necessarily will have retained records until the title VII filing period expires. Under the current regulation, an employer or labor organization may have already lawfully destroyed its employment records before it is notified that a charge has been filed. Moreover, a one year retention period for employers and labor organizations subject to title VII and the ADA will make the records retention period the same as that required by the Commission's regulations under the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.* (ADEA), 29 CFR 1627.3(b)(1) and 1627.4(a)(1). This uniform retention period will simplify and clarify recordkeeping for employers who are also subject to the ADEA.

In order to promote efficiency and to eliminate confusion as to recordkeeping requirements regarding temporary and seasonal employees, the Commission is deleting § 1602.14(b) which provides that the part 1602 recordkeeping requirements do not apply to temporary or seasonal positions. Similarly, the Commission is deleting §§ 1627.3(b)(3) and 1627.4(a)(2) of the ADEA recordkeeping regulations, which provide for a 90 day records retention period for temporary positions, and is clarifying the mandatory nature of such recordkeeping. These changes will require employers to retain records on all employees, permanent and temporary, for a one year period. They will, however, impose a new recordkeeping requirement only on the relatively few employers who are not subject to the recordkeeping provisions of the ADEA.

Section 709(c) of title VII, 42 U.S.C. 2000e–8(c), provides, *inter alia*, that any person who fails to maintain information as required by that subsection and by Commission regulations may, upon application of the Commission or the Attorney General in a case involving a government, governmental agency or political subdivision, be ordered to comply by the appropriate United States district court. At present, Commission regulations do not explicitly provide that the Commission may conduct an investigation when it has reason to believe an employer or other entity subject to title VII has failed to comply with the recordkeeping requirements of part 1602, as when, for example, an employer does not provide the required recordkeeping information to the Commission. The Commission is adding § 1602.56 to give clear notice of its authority to enforce section 709(c) of title VII. The addition of this section is consistent with the Commission's authority to issue suitable procedural regulations to carry out the provisions of title VII, 42 U.S.C. 2000e–12(a), and is an appropriate procedural mechanism for investigating apparent violations of those provisions.

The revisions to § 1602.7 change the annual Standard Form 100 reporting date from March 31 to September 30. By changing the reporting date the Commission also is changing the dates for which the information should be reported, i.e., from the three months preceding March 31, to the three months preceding September 30. Any employer that has received permission to use a different period for reporting may continue to use that approved period. The Commission has determined that this change will result in a reporting date that is less affected by the variation in seasonal employment, such as employment in the construction industry, than the present date and will provide employment figures which reflect annual average employment more closely than the present date does. This change will not affect the date by which employers must report VETS information to the United States Department of Labor, as the VETS data and the Standard Form 100 data are processed separately. The revisions also change the address for obtaining necessary reporting supplies from "Jeffersonville, Indiana" to "the Commission or its delegate."

The revision to § 1602.10 deletes the reference to "section 4(c) of the instructions" and substitutes "section 5 of the instructions." The reference to the 100 employee jurisdictional test of section 701(b) of title VII is deleted since the number of employees required for an employer to be subject to title VII now is 15 or more. This change in no way affects the present Standard Form 100 reporting requirement of 100 or more employees that is set out in the instructions accompanying the form and now is made explicit in the regulation.

In order to provide a mechanism for those subject to the reporting requirements to seek a change in the reporting date or the date by which data should be reported, the Commission has revised § 1602.10 to permit employers to seek changes in those requirements. The Commission notes that retention of the records for the period of one year will increase only minimally, if at all, the employer's cost of maintaining the records. Employers already are required to maintain the records for a period of six months. The cost of retaining the records for an additional six months will be minimal. Moreover, most employers subject to Title VII also are subject to the ADEA, which presently requires that these records be retained for a period of one year.

The Commission estimates that the changes to §§ 1602.14 and 1602.28(a) increasing the title VII records retention period from six months to one year will result in an increased recordkeeping burden on employers of approximately 9,000 burden hours annually. The Commission estimates that the changes in the title VII and ADEA recordkeeping requirements for employers with temporary employees will result in an increased recordkeeping burden of approximately 20,800 burden hours annually. The Commission believes that this increase in burden hours is *de minimis* and that the modifications will not have a significant impact on a substantial number of small employers. Further, the Commission believes that the above cited benefits of the modifications, by establishing a uniform period of recordkeeping for full time and part time employees under title VII, ADA and the ADEA, outweigh the minimal increase in recordkeeping burden hours on employers. For the above reasons, the regulatory change

will simplify the recordkeeping requirements. The Commission also certifies under 5 U.S.C. 605(b), enacted by the Regulatory Flexibility Act (Pub. L. No. 96–354), that these modifications will not result in a significant economic impact on a substantial number of small employers and that a regulatory flexibility analysis therefore is not required.

List of Subjects in 29 CFR Parts 1602 and 1627

Equal employment opportunity. Reporting and recordkeeping requirements.

For the Commission.

Evan J. Kemp, Jr.,

Chairman.

Accordingly, 29 CFR parts 1602 and 1627 are amended as follows:

PART 1602—[AMENDED]

1. The heading for part 1602 is revised to read as follows:

PART 1602—RECORDKEEPING AND REPORTING REQUIREMENTS UNDER TITLE VII AND THE ADA

2. The authority citation for part 1602 is revised to read as follows:

Authority: 42 U.S.C. 2000e–8, 2000e–12; 44 U.S.C. 3501 *et seq.*; 42 U.S.C. 12117.

3. Section 1602.1 is revised to read as follows:

§ 1602.1 Purpose and scope.

Section 709 of title VII [42 U.S.C. 2000e] and section 107 of the Americans with Disabilities Act [ADA] [42 U.S.C. 12117] require the Commission to establish regulations pursuant to which employers, labor organizations, joint labor-management committees, and employment agencies subject to those Acts shall make and preserve certain records and shall furnish specified information to aid in the administration and enforcement of the Acts.

4. The heading for Subpart A is revised to read as follows:

Subpart A—General

§ 1602.1 [Amended]

5. Section 1602.1 is moved under subpart A.

§§ 1602.2–1602.6 [Removed]

6. Sections 1602.2–1602.6 are removed and reserved.

§ 1602.7 [Amended]

7. Section 1602.7 is amended by revising the first and last sentences to read as follows:

§ 1602.7 Requirement for filing of report.

On or before September 30 of each year, every employer that is subject to title VII of the Civil Rights Act of 1964, as amended, and that has 100 or more employees, shall file with the Commission or its delegate executed copies of Standard Form 100, as revised [otherwise known as "Employer Information Report EEO–1"] in conformity with the directions set forth in the form and accompanying instructions. * * * Appropriate copies of Standard Form 100 in blank will be supplied to every employer known to the Commission to be subject to the reporting requirements, but it is the responsibility of all such employers to obtain necessary supplies of the form from the Commission or its delegate prior to the filing date.

8. Section 1602.10 is revised to read as follows:

§ 1602.10 Employer's exemption from reporting requirements.

If an employer claims that the preparation or filing of the report would create undue hardship, the employer may apply to the Commission for an exemption from the requirements set forth in this part, according to instruction 5. If an employer is engaged in activities for which the reporting unit criteria described in section 5 of the instructions are not readily adaptable, special reporting procedures may be required. If an employer seeks to change the date for filing its Standard Form 100 or seeks to change the period for which data are reported, an alternative reporting date or period may be permitted. In such instances, the employer should so advise the Commission by submitting to the Commission or its delegate a specific written proposal for an alternative reporting system prior to the date on which the report is due.

§ 1602.11 [Amended]

9. Section 1602.11 is amended as follows:

a. In the first sentence, after "purposes of title VII" insert "or the ADA".

b. In the second sentence, after "section 709(c) of title VII" insert "or section 107 of the ADA".

§ 1602.12 [Amended]

10. Section 1602.12 is amended as follows:

a. In the first sentence, after "purposes of Title VII" insert "or the ADA".

b. In the second sentence, after "section 709(c)" insert "of Title VII, or section 107 of the ADA".

c. By revising the parenthetical at the end of the section to read as follows:

[Approved by the Office of Management and Budget under control number 3046–0040]

§ 1602.14 [Amended]

11. Section 1602.14(a) is amended as follows:

a. By removing the words "6 months" wherever they appear and replacing them with the words "one year".

b. In the first sentence, after "not necessarily limited to" insert "requests for reasonable accommodation,".

c. In the third sentence, after "under title VII" insert "or the ADA".

d. By revising the parenthetical at the end of the section to read as follows:

[Approved by the Office of Management and Budget under control number 3046–0040]

§ 1602.14 [Amended]

12. Section 1602.14 is amended by removing paragraph (b), by removing the designation from paragraph (a), and by revising the parenthetical at the end of the section to read as follows:

[Approved by the Office of Management and Budget under control number 3046–0040]

§ 1602.19 [Amended]

13. Section 1602.19 is amended as follows:

a. In the first sentence, after "purpose of Title VII" insert "or the ADA".

b. In the second sentence, after "section 709(c) of title VII" insert "or section 107 of the ADA".

§ 1602.21 [Amended]

14. Section 1602.21(b) is amended as follows:

a. In the first sentence, after "not necessarily limited to" insert "requests for reasonable accommodation,".

b. In the second sentence, after "under Title VII" insert "or the ADA".

§ 1602.26 [Amended]

15. Section 1602.26 is amended as follows:

a. In the first sentence, after "purposes of Title VII" insert "or the ADA".

b. In the second sentence, after "section 709(c)" insert "of Title VII or section 107 of the ADA".

§ 1602.28 [Amended]

16. Section 1602.28(a) is amended as follows:

a. By removing the words "6 months" wherever they appear and replacing them with the words "one year".

b. In the third sentence, after "under title VII" insert "or the ADA".

c. By revising the parenthetical at the end of the section to read as follows:

[Approved by the Office of Management and Budget under control number 3046-0040]

§ 1602.31 [Amended]

17. Section 1602.31 is amended as follows:

a. By removing paragraph (b) and the designation from paragraph (a).

b. In the first sentence, after "not necessarily limited to" insert "requests for reasonable accommodation."

c. In the third sentence, after "under title VII" insert "or the ADA".

d. By revising the parenthetical at the end of the section to read as follows:

[Approved by the Office of Management and Budget under control number 3046-0040]

§ 1602.37 [Amended]

18. Section 1602.37 is amended as follows:

a. In the first sentence, after "purposes of title VII" insert "or the ADA".

b. In the second sentence, after "section 709(c) of title VII" insert "or section 107 of the ADA".

§ 1602.40 [Amended]

19. Section 1602.40 is amended as follows:

a. By removing paragraph (b) and the designation from paragraph (a).

b. In the first sentence, after "not necessarily limited to" insert "requests for reasonable accommodation."

c. By revising the parenthetical at the end of the section to read as follows:

[Approved by the Office of Management and Budget under control number 3046-0040]

§ 1602.45 [Amended]

20. Section 1602.45 is amended as follows:

a. In the first sentence, after "purposes of title VII" insert "or the ADA".

b. In the second sentence, after "section 709(c) of title VII" insert "or section 107 of the ADA".

§ 1602.49 [Amended]

21. Section 1602.49 is amended as follows:

a. By removing paragraph (b) and redesignating paragraph (c) as new paragraph (b).

b. In the first sentence of paragraph (a), after "not necessarily limited to" insert "requests for reasonable accommodation."

c. By revising the parenthetical at the end of the section to read as follows:

[Approved by the Office of Management and Budget under control number 3046-0040]

§ 1602.54 [Amended]

22. Section 1602.54 is amended as follows:

a. In the first sentence, after "purposes of title VII" insert "or the ADA".

b. In the second sentence, after "section 709(c) of title VII" insert "or section 107 of the ADA".

23. A new subpart R consisting of § 1602.56 is added, to read as follows:

Subpart R—Investigation of Reporting or Recordkeeping Violations

§ 1602.56 Investigation of reporting or recordkeeping violations.

When it has received an allegation, or has reason to believe, that a person has not complied with the reporting or recordkeeping requirements of this Part or of Part 1607 of this chapter, the Commission may conduct an investigation of the alleged failure to comply.

Part 1627—[Amended]

24. The authority citation for 29 CFR part 1627 continues to read as follows:

Authority: Sec. 7, 81 Stat. 604, 29 U.S.C. 626; sec. 11, 52 Stat. 1060, 29 U.S.C. 211; sec. 12, 29 U.S.C. 631; Pub. L. No. 98-532, 108 Stat. 1642, sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

§ 1627.3 [Amended]

25. In § 1627.3, paragraph (b)(3) is redesignated as new paragraph (b)(4).

26. Newly designated § 1627.3(b)(3) is amended by removing the word "may" and replacing it with the word "shall" and by revising the words "paragraph (b) (1), (2), or (3)" to read "paragraph (b) (1) or (2)".

§ 1627.4 [Amended]

27. In § 1627.4, paragraph (a)(2) is removed and paragraph (a)(3) is redesignated as new paragraph (a)(2).

28. Newly designated § 1627.4(a)(2) is amended by removing the word "may" and replacing it with the word "shall" and by revising the words "paragraph (a) (1) or (2)" to read "paragraph (a)(1)".

§ 1627.5 [Amended]

29. Section 1627.5(c) is amended by removing the word "may" and replacing it with the word "shall".

[FR Doc. 91-17513 Filed 7-25-91; 8:45 am]

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FACTS ABOUT
THE AMERICANS WITH DISABILITIES ACT

Title I of the Americans with Disabilities Act of 1990, which takes effect July 26, 1992, prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions and privileges of employment. An individual with a disability is a person who:

- Has a physical or mental impairment that substantially limits one or more major life activities;
- Has a record of such an impairment; or
- Is regarded as having such an impairment.

A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question. Reasonable accommodation may include, but is not limited to:

- Making existing facilities used by employees readily accessible to and usable by persons with disabilities;
- Job restructuring, modifying work schedules, reassignment to a vacant position;
- Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

An employer is required to make an accommodation to the known disability of a qualified applicant or employee if it would not impose an "undue hardship" on the operation of the employer's business. Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources and the nature and structure of its operation.

An employer is not required to lower quality or production standards to make an accommodation, nor is an employer obligated to provide personal use items such as glasses or hearing aids.

PRE-EMPLOYMENT INQUIRIES AND MEDICAL EXAMINATIONS

Employers may not ask job applicants about the existence, nature or severity of a disability. Applicants may be asked about their ability to perform specific job functions. A job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in similar jobs. Medical examinations of employees must be job related and consistent with the employer's business needs.

DRUG AND ALCOHOL ABUSE

Employees and applicants currently engaging in the illegal use of drugs are not covered by the ADA, when an employer acts on the basis of such use. Tests for illegal drugs are not subject to the ADA's restrictions on medical examinations. Employers may hold illegal drug users and alcoholics to the same performance standards as other employees.

EEOC ENFORCEMENT OF THE ADA

The U.S. Equal Employment Opportunity Commission will issue regulations to enforce the provisions of Title I of the ADA on or before July 26, 1991. The provisions take effect on July 26, 1992, and will cover employers with 25 or more employees. On July 26, 1994, employers with 15 or more employees will be covered.

FILING A CHARGE

Charges of employment discrimination on the basis of disability, based on actions occurring on or after July 26, 1992, may be filed at any field office of the U.S. Equal Employment Opportunity Commission. Field offices are located in 50 cities throughout the United States and are listed in most telephone directories under U.S. Government. Information on all EEOC-enforced laws may be obtained by calling toll free on 800-USA-EEOC. EEOC's toll free TDD number is 800-800-3302. For TDD calls from the Washington, D.C. Metropolitan Area, dial (202) 663-4494.

This fact sheet is available in the following formats: Print, Braille, large print, audiotape and electronic file on computer disk. For further information call the Office of Equal Employment Opportunity on (202) 663-4395 (voice), (202) 663-4399 (TDD) or FTS 989-4395 (voice), 989-4399 (TDD).

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